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BPA

THE HISTORY OF THE  
CITY OF BOSTON





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**R E P O R T S**  
**OF**  
**C A S E S**  
**ARGUED AND ADJUDGED**  
**IN THE**  
**COURT OF APPEALS**  
**OF**  
**V I R G I N I A.**

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**BY**  
**D A N I E L C A L L.**

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**VOLUME SECOND.**

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**RICHMOND:**  
**Printed by THOMAS NICOLSON.**  
**M,DCCC,II.**

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V.6  
1799-1801  
COPY 5

## District of Virginia to wit:

**B**E it remembered, that on the twenty fourth day of May, in the twenty sixth year of the Independence of the UNITED STATES of AMERICA. DANIEL CALL, of the said District, hath deposited in this office, the title of a book, the right whereof he claims as author, in the words following to wit: *Reports of Cases Argued and Adjudged, in the Court of Appeals, of Virginia, by DANIEL CALL, In conformity to the act of the Congress of the UNITED STATES, entitled, An act, for encouragement of learning, by securing the copies of Maps, Charts and Books, to the authors and proprietors of such copies during the time therein mentioned.*

*William Marshall,*

Clerk of the District of VIRGINIA.



To the Honorable Edmund Pendleton Esquire,  
PRESIDENT of the Court of Appeals.

SIR,

The gratitude of a young Author for Friend and Benefactor, who had directed his early studies, naturally led me, to address the former volume of this work, to the Gentleman, whose name is prefixed thereto. The share you have had in the decisions contained in both, independent of the high marks of confidence and approbation, which you have received from your Country, during the course of your well spent Life, obviously points you out, as the person, to whom, above all others, I ought to inscribe the present publication. In which fidelity has been my chief object; and, through the politeness of the Judges, I hope, I have been able to attain it. That you may long continue to occupy the great Station which you have hitherto filled, with such distinguished reputation to yourself, and benefit to the Commonwealth, is the sincere wish of Sir,

Your most ob't Servt.

Daniel Call.

RICHMOND, }  
AUGUST 28th, 1802. }

1799-1801

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VIRGINIA

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2 CALL'S

*Your most ob't Servt.*

*Daniel Call.*

RICHMOND, }  
AUGUST 28th, 1802. }

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Page	17, Line	8, for <i>debts</i> read <i>debts</i> .
33,	20,	for <i>ensure</i> read <i>enure</i> .
37,	15,	for <i>as is</i> read <i>is as</i> .
80,	22,	for <i>son</i> read <i>son's issue</i> .
105,		seven lines from the bottom, for <i>to the surplus: to one fourth of which, the defendant was entitled,</i> read <i>to the surplus of which, the defendant was entitled one fourth</i> .
110,		four lines from bottom in note for <i>drawee</i> read <i>drawee</i> .
113,	16,	leave out <i>currency</i> .
119,	7,	for <i>interest be</i> read <i>interest to be</i> .
135,	27,	for <i>devises</i> read <i>devisees</i> .
139,	18,	for <i>the defendants</i> read <i>the creditor defendants</i> .
147,	16,	for <i>land</i> read <i>laid</i> .
148,	4,	for <i>ower</i> read <i>owner</i> .
168,		six lines from the bottom for <i>devise</i> read <i>devisee</i> .
276,	3,	of the case of Mayo <i>vs</i> Clark instead of <i>for altering</i> read <i>concerning</i> .
381,	9,	for <i>impresses</i> read <i>imposes</i> .
455,	7,	for 1. Roll, read 2. Roll. and line 23 for <i>creditor</i> read <i>creditors</i> .
468,		six lines from the bottom for <i>passages</i> read <i>passage</i> .
484,	29,	for <i>it all</i> read <i>it at all</i> ; and line 33 for <i>they</i> read <i>the slaves</i> .
487,		five lines from the bottom after <i>mentioned</i> read <i>in</i> .
544,		two lines from the bottom for <i>on account</i> read <i>by reason</i> .
545,	16,	for <i>stept</i> read <i>stept</i> .
582,	10,	for <i>constructing</i> read <i>construing</i> .



C A S E S  
 ARGUED AND DETERMINED  
 IN THE  
 COURT of APPEALS  
 IN  
 OCTOBER TERM OF THE YEAR 1799.

FOX & al. against COSBY.

COSBY and Gregory as surviving partners of James Mills & Co. brought suit in the District Court, against John Fox the heir at law of John Fox deceased, and Ann Fox, William Fox, Thomas Booth Fox and Henry Fox his devisees, upon a bond given by the said John Fox deceased, wherein he bound himself and his heirs for payment of the sum of £444 : 4 : 9½. The writ was executed on John Fox, Ann Fox, William Fox, and Thomas B. Fox, and, upon their failing to appear, the conditional order was confirmed against them, in the clerk's office. At the next court the following entry was made "on the motion of the defendants by their attorney, who pleaded *payment made by their ancestor and tator*; to which the plaintiff replied generally, "It is ordered that the judgment obtained in the office against them be set aside." At the next court, John Fox, on the plaintiffs motion, was appointed guardian to the defendant Henry Fox; and, as to him, the plea of payment was withdrawn, and the cause sent back to the rules for further proceedings to be had therein, with leave to the other defendants to *plead a new plea setting forth or denying assets*. A rule to plead, was afterwards given, in the clerk's office, to the defendants; who failing to comply therewith, the plaintiff at a subsequent rule day, took judgment

A. by

If defendant obtains leave to amend his plea, he may elect to make the amendment or not as he pleases; and if he fails to do so, the former plea is not withdrawn but the issue on it should be tried.

*Quer.* What proceeding should be used in order to compel an infant defendant to appear and plead?

It is error to take judgment against an infant defendant by default, when he has not been arrested, or appeared by his guardian, notwithstanding



Fox,  
vs.  
Colby.

one has been appointed, by the court, to defend him in the suit.

by *nil dicit*; which not being set aside, at the succeeding term, stood confirmed.

The defendants afterwards petitioned this court for a writ of superseatas; and for cause assigned, "that the judgment was entered finally against all the defendants, although the plea of payment had only been withdrawn as to one of them; whereas no judgment could legally have been entered until the plea of payment had been tried, and a verdict found thereon."

WICKHAM for the plaintiff. Made two points, 1. That an order was taken at the rules against an infant defendant; which he submitted could not be done. 2. That the judgment at the rules was against all the defendants; which he insisted was wrong, as three of the defendants had plead payment, and the plea not being withdrawn, ought to have been tried, as to those defendants. For the leave to plead a new plea, if not exercised, was no waiver of the first plea.

CALL *contra*. It is the constant course in all the courts to take orders at the rules against infant defendants as well as against adults; and no distinction in point of practice is ever made between them. The leave taken, by the other defendants, to plead a new plea was a waiver of their former plea. But if this be not so, the judgment is certainly right as to the infant defendant. Because the judgment, at rules, is in that case to be considered, as only applicable to him. For the addition of the letter *S*, to the word defendant, is only a misprision of the clerk; (as the setting aside the office judgment, could not apply to the infant defendant, for none had been given against him; and therefore the entry could only relate to those against whom the office judgment had been rendered,) which being apparent upon the record, the court will not regard it; but will consider the case in the same manner, as if the letter *S* had not been added; and then it will be a judgment against the infant defendant only; and  
the

the cause will remain, upon the issue docket, as to the other defendants; and as to them may be tried hereafter, if it is found necessary.

Fox,  
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WICKHAM in reply. The order at rules is certainly against all the defendants, which for the reasons before given was clearly wrong. If the contrary were true, and the cause as to the defendants who plead payment was still on the issue docket, it might be made to appear by writ of *certiorari*. But the reverse is unquestionably the case; and the whole cause has been decided on by the order, at rules, notwithstanding there was a good plea for some of the defendants.

*Cur. adv. vult.*

PENDLETON President delivered the resolution of the court to the following effect.

There is clearly error as to the four defendants who are adults. Their plea of payment is not waived. The leave to plead additional matter prescribed in the order, left it optional in them to make use of it or not as they thought proper; and therefore they could not be in default, for not availing themselves of the privilege: But on their failing to file a further plea, the issue, on the former, should have been tried in court.

The case of the infant defendant has some difficulty; but since it does not appear, that he was arrested, or ever appeared to the action (for if the plea for the defendants generally, comprehends him, which is doubtful, that appearance, being by attorney, was certainly error and rectified afterwards,) a guardian was appointed by the court on the motion of the plaintiffs; but it is not shewn that he acted, or ever had notice of the appointment. The appearance of the infant by him, at the rules, is not stated, but a general rule to plead given against all; and at the next rules, the judgment by default is entered. Instead of which, the clerk should have certified, that upon the rule to plead no plea had been filed

for

Fox,  
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Golby.

for the adults, nor any appearance entered for the infant, by his guardian. Upon which the court would have proceeded to try the issue as to the former, and have taken steps to compel the guardian to defend the infant, if they had power to do so, or have assigned another guardian for the purpose. The judgment therefore is to be reversed, and the cause remanded to the District Court for further proceedings to be had therein.

The judgment was as follows,

"The court is of opinion that there is error in the said judgment as to John, Ann, William and Thomas Booth Fox defendants in the original suit, in this, that their plea of payment not having been waived, although they had leave to plead at the rules further matter prescribed by the court, the permission was optional in them, and they could not be in default for not availing themselves of it, but on their failing to file a further plea, the cause should have been tried in court upon the former issue joined. And that there is also error in the said judgment as to Henry Fox the other defendant in the said suit, who being an infant is not stated in the record to have appeared by his guardian to defend the suit, nor does it appear that the guardian appointed by the Court, on the motion of the defendants ever acted under, or even had notice of such appointment, and therefore instead of the judgment by default entered at the rules against the infant, a motion should have been made to the court for proceeding against that guardian, or the appointment of another for the defence. Therefore it is considered that the said judgment be reversed and annulled and that the plaintiffs recover against the defendants their costs by them expended in the prosecution of their writ aforesaid here. And it is ordered that the cause be remanded to the said District Court for further proceedings to be had therein."

FLEMINGS.

## FLEMINGS,

against

WILLIS.

**L**EWIS WILLIS and Anne his wife and John Taliaferro brought a bill, in the High Court of Chancery, stating, that on the 17th, of April 1762, the plaintiff Anne, daughter of Charles Carter, being about to intermarry with John Champe jr, son of John Champe, it was agreed between the fathers, that the said Charles Carter should pay the said John Champe, jr. £ 1000; and that the said John Champe, the father, should give to his said son John Champe jr. (amongst other things) in fee simple, *all the lands which he held in the county of King George above Poplar Swamp, and which he had purchased of Jeremiah Bronaugh.* That notwithstanding this agreement by indenture, of the same date, it was stipulated among other things, that in case the marriage took effect, the said John Champe and his heirs should convey to his said son John Champe jr. and his heirs, *all that part of the said John Champe's tract of land, whereon he then lived, lying above the eastern branch of the old mill run called Lambs creek, and the land bought of Bronaugh thereto adjoining.* That there is a material variance, between the original agreement and the said indenture, in this, "that the said John Champe held "distinct tracts of land bought of Jeremiah Bronaugh and lying above Poplar Swamp, in the "county of King George aforesaid, and all of "them except one called the farm containing by "estimation                      acres of land adjoining to "the said tract on which the said John Champe "lived on the day of the date of the said Indenture; and by the aforesaid description of Bronaugh's land thereon, the said farm although distant from the manor tract, only a quarter of a "mile and separated only by a small slip of land of

Parol evidence admitted to explain the meaning of the parties, in marriage articles, when a conveyance is called for.

" William

Flemings,  
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"William Bronaugh, is omitted." That John Champe the father died, leaving William Champe his eldest son and heir at law, without having executed a deed agreeable to the original agreement or even according to the said Indenture, but after having devised an estate tail only *in all the lands above Poplar Swamp*. That the said John Champe jr. also departed this life in 1774, and by his last will devised the whole of his estate real and personal to the plaintiff Anne for life, with a remainder in tail male in the Farm aforesaid to John Taliaferro.

That the plaintiffs applied to the said William Champe, after the death of the said John Champe, for a deed; which he always refused, and died in 1784; having by his last will devised the omitted tract called the *Farm* as aforesaid to Caroline, Jane, Lucy and Mary Fleming; to whom the plaintiffs have likewise applied to execute a deed *according to the true intent and meaning of the said Charles Carter and John Champe, and the will of the said John Champe junior*; but that they also have refused, alledging that the said Indenture cancelled all contracts preceding it: Whereas the plaintiffs charge, "that before the signing of the Indenture aforesaid, the said Charles Carter objected to the expression *thereto adjoining*, "as excluding the Farm aforesaid, and that he "asked the said John Champe what he meant by "Bronaugh's lands, who replied, *all the land in King George county above Poplar Swamp*, and "that the said Charles Carter immediately and "openly desired a certain John Robinson who "was present at signing, to take notice of what "then passed." The bill therefore prays a conveyance, according to the original agreement, and the will of the said John Champe jr. that is to say, for, not only the tracts of Bronaugh in the said Indenture mentioned, but for the *Farm* tract also.

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There is a second bill, which agrees in substance with the first, but states further, that the said John Champe the father bought of Bronaugh three tracts of land, one of which actually adjoined to the tract on which the said John Champe lived, and the other two were only separated therefrom by a small slip of land, not more than four hundred yards wide. That the whole of the said three tracts only contained 439 acres, and were always considered as appendages belonging to and a part of the manor plantation of the said John Champe the elder, and were never spoken of as distinct estates from the same. That an attorney was directed to draw the articles, agreeable to the original agreement, which being drawn and ready to be executed, on the day of the marriage, the said Charles Carter objected as is mentioned in the first bill to the words *ibereunto adjoining*; and received the answer in the said first bill stated. Of which the company were desired to take notice. That after the death of the said John Champe the elder, the said John Champe jr. took possession of the whole of the land bought of Bronaugh, which he quietly held until his death; comprizing a period of 17 years. That the said William Champe never was possessed of the said lands bought of Bronaugh; and that his claim was only founded on the *mistake*, in the letter of the marriage articles. That therefore either the explanation of the articles given in the bill should be admitted, or should be considered as a new and additional marriage agreement, which had been in part carried into execution, by the long possession of the said John Champe jr.

The answer admits the purchase of the three tracts from Bronaugh; that one of them (to wit, that which is first mentioned in Bronaugh's deed) joins the tract, on which the said John Champe resided, called Lamb's creek; but that the other two tracts which adjoin each other are separated from the first mentioned tract and from the nearest part of the old Lamb's creek tract, more than three

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vs.  
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three quarters of a mile, and full three miles from the mansion house where the said John Champe dwelt. That he settled a quarter and negroes thereon soon after the purchase and before the marriage articles. That from the time of settling the quarter it was distinguished from the manor plantation by the name of *the Farm*. That the defendants do not admit any *mistake or ambiguity* in the marriage articles; but the words *thereunto adjoining* distinguish the tract first mentioned, in Bronaugh's deed as aforesaid, from the other two called *the Farm*. That great inconveniences would result, from receiving parol evidence to explain a deed and extend its operation, contrary to what the plain words would warrant. That the defendants admit, that John Champe jr. took possession of the farm tract, which he held for sometime; but how long they do not know; perhaps until his death; they presume however that this was owing to William Champe's being ignorant of his rights. That the defendants admit the devise by the said William Champe to themselves. To this answer the plaintiffs replied generally.

The deposition of Chadwell states, that he was in the employ of John Champe the elder; that the land on which the mansion house stood and that bought of Bronaugh on the South side of the run were considered as the same plantation, overlooked by an overseer, who resided at the manor plantation; that the two tracts were only separated by a creek and run; and that the run touches the farm plantation; that *the farm* is not more than three quarters of a mile from the Lamb's creek tract. That William Champe never claimed *the farm* tract till a little before his death. The deposition of Bruce is to the same effect.

Jones states, that he drew the articles. That the instructions were furnished by John Champe and (to the best of the deponents recollection) in his own hand writing. That the said Charles Carter called at his house for the articles and

and when the deponent read them over he objected "to the description of Bronaugh's land, as adjoining to the Lamb's creek tract; saying he apprehended the tract of land called *the farm*, which was intended to be settled on Mr. Champe by his father, was not adjoining thereto, and would not be comprehended by the description."

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To which the deponent replied, that the deed was drawn agreeable to Col. Champe's memorandum, and if any doubt existed respecting the *farm* tract of land it should be mentioned to, and explained by Col. Champe. Jordan, states that all the lands on both sides Lamb's creek were considered as one plantation, worked by the same hands, and overlooked by the same overseer. The deposition of Robinson, states, that he was called on to witness the marriage articles; that Charles Carter "objected to some words; which he said did not fully mention the lands promised. That the said John Champe the elder answered, that there was no occasion for an alteration; for his meaning was to give his son his manor plantation and all his lands above Poplar swamp, and also the lands he bought of Jeremiah Bronaugh, mentioned in the marriage settlement; and also all the negroes that should be on the farm plantation at the time of his death." That John Champe jr. took possession after the death of his father and mother. That he never heard that William Champe ever claimed the disputed lands; and that the farm plantation is about the half of a mile from Lamb's creek.

Chadwell's second deposition is substantially the same as the first, but adds that *the farm* is not more than 600 yards from Lamb's creek tract. That the land sold by William Champe to his brother John, called *Grant's* land, lies near the middle of the *farm* land. That the *farm* land does not, in any part, join the land reserved by Col. John Champe for his son William; but lies most convenient to the Lamb's creek tract given

B.

to



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to John Champe. That without the farm plantation and slaves John's part would not be equal to William's. That it was never called *the farm* till Champe bought it of Bronaugh.

The deed from Bronaugh to Champe is for three tracts of land in King George, to wit: one of 153 acres bounded by Rappahannock river, Lamb's creek, and the main road. One other of 151 acres bounded by the lands of Col. William Thornton dec'd and John Grant; and the third of 135 acres known by the name of the Hill's tract bounded by the lands of William Rowley, John Grant and Daniel Grant.

The marriage articles are for "all that part of "his the said John Champe's tract of land, where- "on he now lives, lying above the eastern branch "of the old mill run, called Lamb's creek tract, "and the land bought of Bronaugh *thereunto ad- "joining*; together with all the negroes now on "the said land and their future increase, &c."

The deed from William Champe to his brother John Champe is for 93 $\frac{1}{4}$  acres, bounded by the lands of Daniel Grant's orphans, and side line of the said John Champe; thence to three saplins, joining the lands of said John Champe; thence to a small oak, joining still to the said Champe's land; thence, joining the land of Daniel Grant's orphans, to the beginning.

MARSHALL for the Appellants. Two questions occur in this cause; 1. Whether parol evidence is admissible at all? 2. Whether, if admissible, the evidence produced is sufficient to maintain the relief sought by the bill?

1. The cases on the first point are numerous. In some it is laid down as a clear principle that parol evidence can in no case be received to contradict a deed; and that it can only be received to rebut an equity. In others again it is admitted, that where there has been fraud, or a clear mistake, or a secret trust, there parol evidence may also be received

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received to shew it. But in all it has been received with great caution; and none of them has gone so far as the present. *Cbeney's* case in 5. Co. 68, and *Altkan's* case 8, Co. 155, are the oldest cases upon the subject, and fully prove the rule. But amongst the modern cases 1. *Wils.* 34. is express. For there was no attempt in that case to contradict the deed, and yet parol evidence was rejected. The case of *Meres vs Ansel* in 3. *Wils.* 275 is precisely apposite and needs no comment. That of *Brown vs Selwyn Cas: Temp. Talb.* 240, is very much to my purpose. For although that was the case of a will, the circumstances were much stronger than in our case; and yet the parol evidence was not permitted. The general doctrine is confirmed in 1. *Bro.* 8.; and upon a full review of all the cases I conclude, the rule to be fixed, that parol evidence shall not be received to contradict or vary the terms of a deed; unless it be in some of the instances which I have before mentioned. For example, in the case of a latent mortgage not inserted in the deed; but that case turns upon the fraud: So in the case of a secret trust, because that affects the conscience of the trustee; or lastly, in cases of oppression imposition or mistake; which are circumstances necessarily to be shewn by parol evidence, or the relief could not be afforded. But no case can be produced, which goes the length of deciding, that property not conveyed by the terms of the deed, can be comprehended therein by the aid of parol evidence, unless some of the ingredients, just mentioned, existed in the cause.

2. But if the testimony were admissible, that offered is nevertheless not competent to establish the claim of the plaintiffs. That of Jones is only that he drew the articles according to Champ's instructions; which so far from supporting, the bill goes to defeat it; because it affords a presumption that the articles correspond with the views of the parties. The testimony of Robertson leaves the matter doubtful, and according to one way of

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of considering his words, the declarations of Champe are consistent with the deed. The reference to the articles seems rather to confine his meaning to the lands therein expressed. At most his testimony is uncertain; and therefore can never be a proper foundation for overturning a fixed rule of law. For if evidence, liable to conjectures and doubt, be introduced in questions, relative to the construction of written instruments, then all the dangers of parol evidence; which the law has so anxiously endeavored to guard against, will be increased.

RANDOLPH *contra*. The case of *Ross vs Norvell* 1, *Wash*, 14, goes the full length, of deciding the principle, we contend for, in this. It proves clearly that the circumstances of each case are to determine, whether parol evidence shall be received or not? The addition to the contract actually made by the evidence there, was as great as that which is desired here. The 3. *Atk.* 388; shews, that either fraud or mistake are proper grounds, for the introduction of this kind of testimony. All the cases, upon the subject, are brought together by Powell, in his book of devises; and from them it appears, that the courts, in England, are relaxing from the former strictness of the rule, in order to attain the justice of the case. The case in *Wils.* is repugnant to that in *Vern.* cited by the court in *Ross vs Norvell*; and the effect of the other cases cited by Mr. Marshall, is fully considered by the court in that case, which may now be considered as having established the rule.

Advert therefore to the circumstances. The counsels draft was objected to by Carter, at the time when the articles were about to be signed; and Champe, instead of denying that they were wrong, rather admits it, saying he meant to give the whole tract; and therefore that it was unnecessary to alter them. Consequently, if he did not mean to include the whole, his expression was a fraud; because it was calculated to delude those

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to whom it was addressed. Besides the evidence is, that all these lands were considered as forming one entire tract; and therefore the expression was calculated to embrace them. But what strengthens this opinion is, that William suffered John to enjoy them unmolested: although, as heir at law, he might have entered into and occupied them himself, had he not been conscious, that they were included in the articles. Robertson's deposition is not liable to the interpretation contended for; but expressly proves the objection of Carter, and the acknowledgment of Champe as already mentioned.

MARSHALL in reply. I admitted the principle in *Ross vs Norvell*; which only establishes the case of a latent mortgage; and the circumstances there were extremely flagrant. But that case proves nothing, in the present controversy; because here it is said that other property, than has actually passed, was meant to be conveyed by these articles; and parol evidence is offered in support of it. But the cases which I cited, prove that it cannot be done. That in *Wills*, was an attempt to prove that other property was included in the grant; but the attempt did not succeed. It is said that the circumstances here are important; because the lands were all conveyed to old Champe, by one conveyance: and therefore that they were meant to be comprehended by the articles. But, although they were all included in one conveyance, still they were different tracts; for they were at a considerable distance asunder. It was asked, if the parties did not mean to include them all in the articles, why did William suffer John to occupy them? and I, in my turn, ask, why if they did consider them as included did William undertake to devise them? These circumstances prove nothing. At most they only shew that at one time he misapprehended the articles, and at another, that he had informed himself, upon them. I repeat again, that if parol evidence is admitted at all, it should be clear, distinct and pointed; but here the testimony offered is equivocal and uncertain,

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tain. It may be reconciled with the articles. For if old Champe meant to include the whole **why** did he particularize them by the words, *the lands purchased of Bronaugh in the settlement?* It would have been enough if he said, the lands bought of Bronaugh; and it was not necessary to have added the other words. That addition seems to tie up the meaning; and confines it to the articles expressly.

*Cur. adv. vult.*

PENDLETON President delivered the resolution of the court as follows.

This is a bill for a specific execution of a marriage agreement, in which we are permitted by reason and authority (notwithstanding the agreement was reduced to writing,) to hear parcel proof, of what was the real intention of the parties; the governing principle of the decree.

Col. Champe had acquired a large tract of land where he lived; and Poplar swamp running through it, he had fixed upon that, as a proper line of division, between his two sons William and John. By his will, in '759, he devised to William all his lands, in King George, *below*, and to John all *above* Poplar swamp; clearly giving, to the latter, the farm plantation in dispute.

It is obvious that he did not mean to change this land provision for John, when he was about to marry in 1762; by taking, from him this small farm of 286 acres, convenient to John, but separated from William's land, by John's whole tract. There was another difficulty occurred. If I do not mistake the position of the land, purchased of Bronaugh which (according to the depositions of Chadwell and Bruce and the deed of Bronaugh) adjoined, it lay below Poplar swamp; and under the will would have passed to William: To secure this to John, was the true reason, why Bronaugh's name was mentioned at all; and although Champe, in his instructions, or the draftsman,

man, in pursuing them, might embarrass the literal sense, the intention was, that John should have all the land above Poplar swamp, comprehending the farm; and should also have the tract below, purchased of Bronaugh: Which makes Robinson's deposition perfectly intelligible. It was thus, Champe explained it to Carter, who so understood it, and was satisfied. The same opinion was entertained by Mrs. Champe; who having a right, for life, to John's land, and not to William's, possessed the farm until her death, in 1767. How did William understand it? He suffered his mother to hold it as John's; he afterwards permitted John himself to possess it till his death, in 1774; and then let his devisees hold it till 1783; when he brought suit. But a more direct proof, of his opinion, appears from his deed to his brother, in 1774, for 93<sup>1</sup>/<sub>2</sub> acres of land; which the father had purchased of John Grant, after the marriage agreement; and which descended to William as heir: In the bounds, of which, he calls the farm John's land. Can it be imagined, that if he had considered the farm (a small tract of 286 acres detached from his other land) as belonging to him, that he would not have preserved these adjoining 93 acres to increase it?

It is urged however that he might be ignorant of his title. But is it reasonable to suppose, that he did not understand his rights as well in 1763 as in 1783? He was probably the eldest son, at his brother's wedding; where he heard the conversation between the two fathers, and it is most likely he had heard his father, at other times, speaking on the same subject.

Upon the whole, the decree is a very just one; and is to be affirmed.

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OZWALD,

## OZWALD, DENISTON, &amp; Co. -

against

DICKINSON'S Ex'rs.

Where goods are sold by a factor in Virginia for merchants in Britain, it is necessary to state the name of the factor in the declaration.

So if some of the partners reside in Gr. Britain and some in Maryland in America.


And a suit of this kind will be dismissed after issue joined up on the merits, if the fact appear on the trial of the cause.

And it will not prevent the dismissal, that there are money counts in the declaration.

**T**HIS was *indebitatus assumpsit* brought, by Ozwald, Deniston and Company, against Dickinson's executors in the county court. The declaration contained four counts. 1. For goods, wares and merchandizes sold and delivered to the testator. 2. A *quantum valebat* for the same. 3. For money paid and advanced for the use of the testator. 4. For money had and received by the testator to the use of the plaintiffs. Plea non assumpsit; and issue. Upon the trial of the cause the court, on the motion of the defendants' attorney, ordered the jury to be discharged from giving a verdict, and the suit to be dismissed, at the costs of the plaintiffs. To which opinion of the court the plaintiffs filed a bill of exceptions, stating, that "on the trial of the cause, it was given in evidence, that the goods, wares and merchandizes mentioned in the declaration were sold and delivered to the defendants' testator, by John Murray factor for the plaintiffs; and that at the time of said sale or delivery, the house of Ozwald, Deniston & Co. consisted of George and Alexander Ozwald. Deniston who resided in Great Britain, and Robert Dick who resided in the state of Maryland; and at the time of bringing the suit all the surviving partners of the said house resided in Great Britain. That thereupon the defendants' counsel moved the court to dismiss the suit, because it was not stated in the declaration that the goods, wares and merchandizes were sold and delivered to the defendants' testator, by John Murray as factor for the plaintiffs; and that the court accordingly ordered the suit to be dismissed, and the jury to be discharged."

There

There is an account which the clerk of the County Court has copied into the record and certifies was filed in the cause; but which was not made part of the record, by any act in the County Court; in this account the plaintiffs charge the testator, with various articles of merchandize, and several sums in cash, (the whole account, of *debts* for cash and merchandizes amounting to £ 245:11,) and give credit for sundry hogsheds of tobacco and a few small sums in cash; the whole amount of credits, for cash and tobacco, being £ 121:10:3; thus leaving a balance due the plaintiffs of £ 124:0:9.

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The plaintiffs appealed from the judgment of the County Court, to the District Court; where the judgment was affirmed, and from the judgment of affirmance, the plaintiffs appealed to this court.

**CALL** for the appellant. The District Court in affirming the judgment of the County Court erred in two respects. 1. Because the act of Assembly only relates to cases, where all the partners lived in great Britain and Ireland; but here the bill of exceptions states that one resided in the state of Maryland: and this being a mere positive law, relating only to matter of form will be construed strictly. 2. Because there were two money counts in the declaration, and the exhibits copied into the record shew that there was a demand for cash advances: Therefore at most, the court ought only to have directed the jury to disregard the counts for merchandize, and to confine themselves to those for money only. Instead of which, they have dismissed the whole suit; which they had no authority to do; as the plaintiffs had a right clearly, to proceed upon the money counts.

**WICKHAM and BOTTS contra.** The act of 1755 *chap. 2. Sect. 7.* is express, that the name of the factor shall be inserted, under pain of having the suit dismissed with costs; and of course the plaintiffs, by omitting to insert it in the present



Orzward & co. <sup>vs.</sup> sent case, subjected themselves to the inconvenience of a dismissal, That the objection was not taken till the trial of the issue makes no difference; because the defendant could not tell for what the suit was brought, until it was made known upon the trial of the cause? and therefore it is within the reason of the case of *Corrie's exrs. vs Campbell* 1. Wash. 153. That one of the partners lived in Maryland will not alter the case; because he might have been a secret partner only, and in point of fact it does not appear that he was known to the defendant, until the trial of the cause. So that if this construction should prevail, the law which was beneficial to the citizens might be totally evaded. What we contend for has been decided in the Federal Court, upon a serious argument, in a case where a verdict was found subject to the opinion of the Court upon this very point. The objection that there are counts for money, as well as merchandize, has no weight in it. Because by reference to the exhibits it appears that there were payments in tobacco and other things equal to the money advances; and therefore, setting those against each other, the remainder will be goods and merchandizes only; and so, the case will be a suit for goods actually sold and delivered here, by the factor of the plaintiffs; which brings it precisely within the words of the act of Assembly. Besides the whole scope of the record shews evidently, that to have been the true nature of the suit; and that the money counts were not intended to be relied upon. The declaration does not recite the names of all the partners; and therefore the evidence, which went to shew that the debt was due to others, as well as those actually named in the declaration, was irrelevant and improper.

CALL and WARDEN in reply. Either the exception should have been taken by motion, before plea pleaded, or it should have been pleaded in abatement. For it was too late to insist upon it, after issue had been joined upon the merits, and the cause

cause was actually under trial. It is no excuse to say, that the defendant could not foresee what would be the charges against her, and therefore could not be prepared to make the objection, until she was informed thereof upon the trial; because she might have refused to plead until the plaintiffs furnished her with a sight of the account; in which case the court would have staid proceedings until it was done, or else she might have admitted that these articles were sold to her testator, and averring that they were sold by a factor, have denied that the plaintiffs sold any other good to the decedent. By both which methods, the objection, might have been made, at an earlier stage of the cause; and consequently ought to have been urged before: Especially as the exception is but a mere dilatory, tending to delay justice; and therefore not to be favored. At any rate, the plaintiffs had a right to go to trial upon the money counts. This was a right which the county court could not take from them; although they had not produced a tittle of evidence to support these counts. For still, they had a right to submit their case to the jury; who could only find a verdict against them, in case they had no evidence. Therefore the County Court, by arresting the proceedings and dismissing the suit, exercised a power which did not belong to them. But, in point of fact, it appears that there was testimony upon those counts; and the notion, contended for on the other side, that as there had been payments, which if opposed to the cash advances, would counterbalance them and leave only the goods, ought not to influence the case in the slightest degree. For why shou'd the account for the sake of operating injustice and delay? and, if it was to be garbled at all, why not oppose the payments to the goods, as well as to the cash? For there is surely as much reason for the one as the other. No such attempts however should be made; but the account should stand as it was; and then there was a clear demand for cash advanced; which applied to the

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money counts: And therefore the plaintiffs ought to have been heard upon them. The act does not in terms, provide for a case like this, where some of the partners lived in Great Britain, and some in America: Therefore, as it is a law, whose operation tends to prevent the speedy attainment of justice, upon a mere matter of form, it ought not to be taken by equity; so as to affect cases not within the express letter of the statute.

*Cur. adv. vult:*

PENDLETON President delivered the resolution of the court as follows.

Much unnecessary time was employed in the argument of this plain case.

1. The time and mode of making the objection are excepted to; and it was said that the defendant should either have pleaded in abatement, or demurred, or moved for the dismissal at an earlier period.

Whereas it is obvious that the Legislature did not intend there should be any pleading on the occasion, but that when the case appeared, a dismissal should take place.

A plaintiff could scarcely be supposed to state a case in his declaration which would subject his suit to a dismissal on view of it. But on the trial he must prove the real case, which then, and not before, appearing to be within the act, it was the proper and only time to move for the dismissal.

2. It was said the account was of mixed articles consisting of cash and goods; that the declaration has two counts for goods, and two, for money lent, and for money received to the use of the plaintiffs; and therefore that the court should not have dismissed the suit entirely, but suffered the plaintiffs to give evidence as to the cash articles, which are not within the act of Assembly.

In answer to which, it was said by the council  
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for the appellee, and perhaps correctly, that if the declaration was for goods sold by a factor here, for a resident in Great Britain, and the factor was not named, the dismissal must take place, although there were ever so many other demands in the declaration.

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But suppose a partial dismissal admissible, and the goods be taken from the declaration and account, then the plaintiffs will be found indebted £47:11:9; for so much the credits exceed the other articles. However the plaintiffs themselves consider their demand to be for goods, and so they state it in their bill of exceptions.

3. A third objection was that all the partners do not reside in Britain, but Dick, one of them, in a sister state in America. The name of this partner does not appear in the ostensible firm of the company; but he is what is called a latent or secret partner, unknown to be one perhaps by every person, but the company themselves, and therefore not usually to be regarded in questions of this sort, between the company and others.

Again a factor dealing for a resident in Maryland is equally within the mischief intended to be remedied, by considering it as a dealing with the factor himself. Among others, one important effect is to take the case out of the saving, in the act of limitations, in favour of persons out of the country; which extended to the partner in Maryland as well as to those in Britain.

And since the exceptions state, that at the time of commencing the suit all the surviving partners resided in Great Britain, it is strictly within the letter of the act, which describes the residence of the person or persons in whose names the suit is brought.

The judgment is unanimously and without difficulty affirmed.

EPPES

## E P P E S

against

DEMOVILLE.

The heir may maintain an action of debt on a bond to his ancestor conditioned for quiet enjoyment of lands, where the breach has happened since the death of the ancestor.

**R**OYAL, as executor of Peter Eppes deceased brought suit against Demoville as administrator of Temple Eppes deceased, upon a bond given by the said Temple Eppes to the said Peter Eppes deceased, conditioned for the quiet holding and enjoying a plantation devised to the said Peter Eppes deceased, by his father Lewellen Eppes. The defendant plead payment by his decedent; and fully administered, except as to  $\$86:15:10\frac{1}{4}$ . The plaintiff took issue; and at a subsequent court by consent of the parties, the declaration was withdrawn, and a declaration upon the same bond was filed in the name of Peter Eppes son and heir at law and devisee of Peter Eppes deceased: Which assigned for breach of the condition, a recovery and eviction, by Demoville and his wife, who was grand daughter and heir of the said Temple Eppes deceased. Whereupon without any other pleadings a jury were charged, who found a verdict for the plaintiff, which was set aside on the defendants motion and a new trial awarded. At a future term another jury were charged, without any further pleadings, who returned a verdict for the plaintiff "for the debt in the declaration mentioned "to be discharged by the payment of six hundred "and seventy nine pounds and one penny damages "the value of the assets in the hands of the defendant." The defendant moved to arrest the judgment, and for cause assigned, that the action of the plaintiff "is founded on a bond given to "his ancestor, whereas by law no such action is "maintainable by the heir on a penalty. The "penalty of the bond being a sum in gross which "after the death of the original obligee could only be sued for by his personal representative." The District Court gave judgment for the defendant;

ment; from which judgment the plaintiff appealed to this court.

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MARSHALL for the appellant. It is clear that an action of covenant would have lain for the heir on account of the eviction, which happened in his own time and not in that of his ancestor. But there is no real difference between an action of debt and an action of covenant in a case like this. For whatever form the instrument may wear, it is still a covenant; and an action of debt founded on it, is substantially an action of covenant: Because by the act of Assembly the plaintiff cannot, by bringing an action of debt, have his penalty: he can only have the damages assessed by the jury, which puts him in that respect in the same situation, as if he had brought an action of covenant: But to put him completely so, instead of being confined to one breach only, as formerly, he is at liberty to assign as many as he thinks proper, and he is to have a *scire facias* for new causes of action as they arise. In all which respects it exactly resembles covenant. So that, in fact, it is substantially an action to recover, not a stipulated certain sum, but uncertain damages for the violation of the contract, in proportion to the loss sustained: Which is the essence of an action of covenant. It is therefore an action of debt in name, but of covenant in effect. It is an action which in form, affects to assert the penalty, but which in substance can only enforce damages commensurate to the injury. The difference therefore between the two actions, in cases of this kind, is imaginary, and not real.

The bond, in this case, was a covenant which ran with the land, for the benefit of the heir; and there is nothing personal in it: But the owner of the land is entitled to all advantages arising from it. The damages are in lieu of the land; which belonged to the heir, and were never personal assets: but the condition being broken in the time of the heir, and not in the life time of his

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father, the heir was the only person entitled to redress, and the executor had no cause of action. For the covenant being knit to the estate, according to the expression of legal writers, descended on the heir; and he alone could take advantage of it. 3. *Bac. ab.* 20, 2, *Lev.* 92. 1. *Ventr.* 175.

The analogy between the case of a *Nomine Pœnæ* put in *Bacon* (*ub: sup:*) and the case at bar is particularly strong. For that is a penalty as well as this; that is a sum certain, and so is this; that is a security for payment of a descendible rent, this of a descendible title; that goes to the heir as incident to the inheritance, and this upon the same principle must go to the heir also, as being equally annexed to the inheritance. But it would be idle to say, that he should have the right and not the remedy to assert it.

Upon principle therefore nothing is more clear, than that the action is sustainable; and if there be no precedent of an action of debt brought by an heir in such a case, it is believed that no decision to the contrary can be produced. In which case the principle surely ought to prevail,

**WICKHAM contra.** The heir cannot bring debt on a bond to the ancestor, although the condition may respect lands. For it is a *chose* in action, and vests in the executor, as the obligation is for a sum in gross, and the condition is for the benefit of the obligor. It is therefore *debitum in præsentis*. *Litt. Sect.* 512; and a release of a personal action would discharge it, *Co. Litt.* 292 (*b.*) The mere right to the damages, if it be admitted that they belong to the heir, will not alter the rule, and give him an action of debt upon the bond. For there can be no doubt that the executor is entitled to the money due on a mortgage, and yet he cannot bring ejectment for the lands; but the heir must do it: Which clearly proves that the legal distinctions are preserved.

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If a bond be given to A, with condition to en-  
force B, and the condition is broken, B, cannot  
sue upon the bond although the condition is for  
his benefit. So if there be a bond to A, for pay-  
ment of a sum of money to B, the latter cannot  
sue upon the bond at law, but would be driven  
into a Court of Equity; and yet he may release  
the debt. *Bro. Oblig. pl. 72.* It was upon this  
case, that the case of *Peter vs. Cocke, 1. Wash.*  
*257* proceeded. The argument, that it was a  
covenant running with the land proves nothing.  
For if that circumstance enabled the heir to sue  
upon the bond, then an assignee of the bond might  
likewise. But that the latter could not maintain  
an action on it before the act of 1795, was settled  
by the case of *Craig vs Craig, \** in this court at  
the last term. The doctrine, contended for,  
would create confusion and embarrassment. For  
suppose one breach in the lifetime of the ancestor,  
and another in the time of the heir; if the latter  
can sue, the former will lose his action: Because  
the judgment is to stand as a security, for future  
breaches; and the executor could not sue a *scire*  
*facias* upon a judgment in favour of the heir.  
Besides, it is an argument of some weight, that  
no action of debt was ever brought by an heir on  
a bond to his ancestor. Perhaps it may be ques-  
tionable, whether an action of covenant would  
lie, for an heir, upon a bond to his ancestor; and  
probably, the only case, where the heir could  
maintain such an action, is where the breach  
arises out of a covenant contained in the convey-  
ance for the land. However, be that as it may,  
this is not covenant but debt; and the latter can-  
not be maintained by the heir. For the form of  
actions is not to be departed from. This was set-  
tled in *Byrd vs Cocke, 1. Wash. 232*; and the act  
of Assembly does not confound actions of cove-  
nant and debt together. The cases from 3. *Bac.*  
and

\* 1. Call's rep. 483.



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and 2. *Let.* prove, indeed, that the heir may have the benefit of covenants real, which run with the land; but they decide nothing in the present case. The case of a *nomine pæne* is anomalous; but at any rate it will not disprove the doctrine which we contend for. Especially, as the book does not distinguish whether the heir may bring debt or covenant.

The declaration does not state that the eviction was by one entering as heir to Temple Eppes; and therefore is not certain enough.

There is no issue in the cause. For the first declaration was withdrawn, and no new plea entered to the second. Which consequently was never plead to at all; and therefore, the parties never were at issue on it. For the pleas to the first declaration do not apply to it.

RANDOLPH in reply. The equity of the case is clearly on our side, and therefore the law must be very pointed, to make us lose the benefit of our judgment, on a mere technical exception. There is no ground for the objection, that the eviction is not sufficiently stated in the declaration, as the averment is exactly, what, Mr. Wickham says, it ought to be. For the declaration states the whole matter specially, and that the heir of Temple Eppes sued the plaintiff, and turned him out of possession.

Although debt cannot be brought by the heir on money bonds payable to the ancestor, it is otherwise, as to bonds which concern lands; and in this case the heir is named expressly, for the bond is payable to the ancestor, his heirs, &c; which was proper, as it was for his benefit; and he is now the only person to whom compensation for the loss is due. If there be a bond for payment of rent, and there is a breach in the testator's lifetime, the executor shall bring the suit; because the rent, incurred in the ancestor's lifetime, was part of his personal estate. But where

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the breach does not happen until after the ancestors death the heir shall have the action; because the rent was issuing out of, and concerned the lands. Although the condition is, generally speaking, for the benefit of the obligor, and the penalty, for the benefit of the obligee, as has been said, yet that will not make any difference, in this case; because, in all cases of this kind, the connection, between the penalty and the condition, is so great, that it is impossible to separate them. So that the condition is as much for the benefit of the obligee as the penalty is; and substantially the obligor only covenants for the terms in the condition. It was said, that the penalty goes to the executors, and not to the heir; but no case to that effect is produced. It was also said that the forms of actions were not to be departed from, and that *Byrd vs Cocke* had in effect decided, that the difference, contended for, between debt and covenant ought to be observed. But the cases are not alike; for debt and case do not substantially unite together, in the same manner as covenant and debt upon bonds of this kind. The case of ejectment upon a mortgage does not apply; because the estate is absolute on non-payment of the money, and it is the Court of Equity and not the law which gives the money to the executor. For the law does not recognize the executor's right at all. But here the bond is not for payment of money, nor was it intended to swell the personal estate at all, but it was merely given for the benefit of the heir. Who may always sue where he is the person actually interested. The reason why, the *cestui que use* cannot sue upon the bond to the trustee, is for want of privity. It is not true, that an assignee of the land would not be entitled to sue on this bond; for if he and the executor were contending about the bond, the assignee would be preferred; but, if he has a right to the bond he would also have a right to the action, to enforce the contents of it. It is exactly like the

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case of a covenant for quiet enjoyment, in which case either the heir or assignee may sue. The case of the *nomine pœnæ* for rent is exactly like this in principle. For that is a penalty, and so is this: Therefore the same rule will apply to both cases.

It is not correct to say, that there was no issue in the cause. For as the first pleas were not withdrawn they stood as pleas to the new declaration. But at any rate that objection would not go to destroy the action altogether; it could at most only produce a repleader.

*Cur. adv. vult.*

ROANE Judge. This is an action of debt on a penalty conditioned for the performance of covenants, that is to say, a covenant for quiet enjoyment of a tract of land; it is brought by the heir of the original obligee; and the grounds, on which he sets up his right, are 1. That the bond is payable to Peter Eppes, his heirs, executors and administrators. 2. That the eviction is alleged to have been since the descent of the land to the heir.

It is certainly a general principle, that an executor is the proper party to recover debts due to the testator; and I have not been able to find a single instance of an action of debt being brought by the heir.

It is admitted that an heir may bring an action of covenant, upon a covenant running with the land, for a breach in his own time; and the executor may also bring the same action for a breach committed in the lifetime of the testator: And it is alleged by the counsel for the appellant that under our act of Assembly this action is substantially an action of covenant.

If this position were true, it would perhaps materially vary the opinion I have formed upon the subject.

Covenants,

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vs  
Demoville;*

Covenants, the performance whereof is secured by a penalty, are susceptible of a two fold remedy 1. An action of debt for the penalty, after the recovery of which the plaintiff cannot resort to the covenant; because the penalty is a satisfaction for the whole. 2. An action of covenant, in which the plaintiff, waiving the penalty, proceeds on the covenants, and may recover more or less than the penalty *toties quoties, Lowe vs Peers, 4. Burr. 2225.* The party therefore has his election; and, in the present case, the plaintiff has elected to bring an action of debt for the penalty.

A judgment in this action of debt will be in favor of the plaintiff for the whole penalty, altho' he cannot (without a *scire facias* assigning new breaches) sue out execution for more, of that penalty, than is recovered, as a compensation for the breaches rightly assigned. One action is all that can be brought upon the penalty, proceeding by way of action of debt; but proceeding by action of covenant, and waiving the penalty, ever so many actions may be brought, and separate judgments will be given, in each, for the damages respectively sustained. I am therefore warranted in saying, that the position, that this action is substantially an action of covenant, is incorrect.

This opinion is further confirmed by considering the end and object of making our act relative to the assignment of breaches.

At common law, before that act, in such an action as the present the plaintiff could only assign a single breach; but, for that breach, he could recover judgment and sue execution, for the whole penalty; which often exceeded the real damage; and therefore the defendant was driven into equity for relief. It was to prevent that resort to a Court of Equity, and attain the same purpose in a court of common law, that the act of Assembly was made. But it never was intended, nor does

it

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it operate, to convert the action of debt into an action of covenant.

If then this be not, even in substance, an action of covenant, but entirely an action of debt, it is not enough to support it, for the plaintiff to shew, that the heir may take the benefit of a covenant, as appertaining to his inheritance, but he must proceed in that action which the law gives him: And the cases cited on this part of the subject all have reference clearly to an action of covenant.

If this action is sustainable, it vests a right in the present plaintiff to the whole penalty (subject to his future assignment of breaches;) after which no resort can be had to the covenant itself. The consequence of which is that the executor is excluded from his for a breach committed in the testator's lifetime; whereas, by confining the heir to sue his action of covenant, the executor may also sue his action of covenant, and each of them respectively recover the damages to which they are entitled.

If it be said, on the other hand, that this action of debt upon the penalty, if sued by the executor, would, on his obtaining a judgment, equally exclude the heir from injuries done in his time, I answer that the executor is the proper representative of the testator as to bringing actions of debt; that he can have no judgment without a breach; that, if he gets a judgment at all, it must be for the whole penalty; and that this is a consequence growing out of the nature of the security the testator has taken. Nevertheless, it may be that the executor would, in that case, be a trustee in Equity, for the damages sustained by the heir. But the only question now before us, is whether the heir has a legal right to sue an action of debt upon this penalty?

I beg it may be understood however, that I have formed no opinion (as being unnecessary in the case before us,) whether the present covenant is,

or

or is not, such an one as the heir may sue upon, by action of covenant for an eviction in his time.

There is no ground, whatever, for the position, that the heir has a right to sue in consequence of the word *heirs* being inserted in the *Teneri* of the bond, nor has a single authority been cited to support it.

I am therefore of opinion that the judgment of the District Court ought to be affirmed.

**FLEMING JUDGE.** The single question is whether the heir could bring an action of debt upon this bond? Every decedent leaves two representatives; the executor, who represents his personal rights; and the heir, who represents his real rights. It is the duty of the executor to collect together the personal estate; of which he is a trustee for payment of debts and legacies; and therefore is entitled to sue all actions which relate to the personalty; because he alone is entitled to the possession of the personal assets, for the purposes just mentioned. But the heir is entitled to the realty; and therefore every action, respecting that property, belongs to him. Now the bond in question, related to the lands altogether, and therefore constituted no part of the personal estate of the testator; as no breach had happened, or forfeiture incurred during his lifetime, so as to entitle the executor to a recompence for the damages which the testator had sustained. Consequently, the property in the bond belonged to the heir, as appertaining to the inheritance, which it was intended to secure. For conditions and covenants real, or such as are annexed to estates, descend to the heir, and he alone can take advantage of them. 3. *Bac. ab. 20. cites 1. And. 55.* If the bond had been conditioned for building a house upon the land, and the forfeiture had happened after the death of the testator, it would surely be more consistent with reason and justice that the heir, who was to be benefited by

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Demorell  
Circuit*

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the building, should have the remedy whatever it was, in his own power, than that it should belong to the executor; who, having no interest in the matter, would not be concerned, whether the house was built or not. The case of the *no-mine pœnæ* mentioned in *Co. Litt.* 162, is expressly applicable; and shews that the interest, in conditions and covenants of this kind, vests in the heir. All the foregoing principles more strongly apply in a case like the present, where the land has been lost altogether; and the money recovered is to be in lieu of it. In such a case it would be strange if the law were to establish the useless circuitry, of a suit first by the executor against the obligor, and then of a suit by the heir against the executor. It is certainly better to say, at once, that he who has the right, has the remedy to assert it. There is a passage in *Wentworth's office* of executors which may be thought to militate against this doctrine. But the author appears to me to have had no fixed opinion concerning it. For in one place he says, the money when recovered by the executor is assets, and in another that he is trustee for the heir. Both of which cannot be true. But they serve to shew however, the oscillation of his own mind upon the subject; and therefore but little weight is attached to his observations with respect to the point. It is said that there is no case produced of such an action having ever been brought by an heir; but that argument will perhaps apply both ways; for neither has any authority been produced, of its having ever been decided, that the action must be brought by the executor: Which leaves it equally as uncertain, whether an action, by the executor, could be maintained; and that very uncertainty is of itself, a reason, with me, for not sending the plaintiff back to explore the difficulty. Upon the whole, I am for reversing the judgment of the District Court, and entering judgment for the plaintiff.

CARRINGTON

CARRINGTON Judge. I concur with the Judge, who last delivered his opinion; which if not supported by strict law, is, at least, agreeable to the soundest principles of justice and good sense.

From  
Demoville.

But the law is certainly with the opinion. In 2. *Bac.* 421, it is said, that rents in lieu of profits, charters and writings relating to lands go to the heir; and in the passage cited from 3. *Bac.* 20, conditions and covenants real, such as are annexed to real estates, go to the heir also. So that the title to the security seems to be clearly vested in the heir: And it is admitted that an action of covenant would have lain for him. But I cannot discover any reasonable distinction between debt and covenant in such a case. For in both the object is to recover compensation for a specific injury done to the inheritance, or in other words to the heir; and why the recovery should in one action ensue to the heir, and in the other to the executor, is very difficult to conceive.

The bond in the present case, upon the very face of it, imports that it could not form any part of the personal assets. For it respected the title to the inheritance only, to which it was an appendage. The heir therefore had a right to it as one of the muniments of his title; and, as the breach happened in his own time, he had a right to sue upon it; and might bring debt or covenant at his election. For if the covenant binds the obligor and his representatives to the heir, the contents of it must belong to the heir likewise; and the sum being certain an action of debt to recover it was properly brought.

Indeed the conduct of the defendant admits the propriety of the action. For, instead of excepting to the form of the action, he has plead over, and stated assets to a certain amount. On which plea an issue was taken; and on the trial a verdict passed for the plaintiff. After which it would be too much to allow an exception to the action,  
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without clear principles, or the most decisive authorities require it. But, as there are neither in the present case, I think the judgment of the District Court should be reversed; and that judgment should be entered for the plaintiff.

**LYONS Judge.** This is a suit at Common Law, and must be decided according to the rules and principles of the Common Law,

By the Common Law all charters and writings relating to the freehold and inheritance, that is to say, deeds and covenants conveying lands, which can be transferred as I understand it, follow the interest of the land and belong to the heir to protect his title. But leases, mortgages, judgments and bonds for payment of money, belong to the executor and are assets.

Leases, made by the ancestor, reserving rent to the heir and executor, go to the heir; the rent being incident to the reversion: But mortgages, bonds payable to the ancestor and heir for money, or in a penal sum go to the executor; for the executor shall take advantage of covenants in gross. *1. Vent. 175.*

A bond for conveying of land or for further assurances, conveys no estate at Common Law, nor can any estate be recovered by suit upon it. Such a bond will not enable the heir to recover or defend at law; it is not assignable at Common Law, and cannot be transferred to a purchaser: It is therefore useless to the heir in that respect. Money and not land is to be recovered on it; and the whole penalty is forfeited by a single breach. It is true that either party may have recourse to a Court of Equity; the obligee for a specific performance of the condition, and the obligor to be relieved against the penalty, on making compensation. But at law the action must be for the penalty only, and as that is money and a gross sum, the suit must be brought by the executor as legal representative of the personal estate.

In

In *Wentworth's office of executor's*, it is said, "If A. be bound to B. by bond, statute or recognizance for assurance of land, B. dieth, and the land descend to the heir; or be it that B. sold the land to C, and assigned to him the bond &c. yet must the suit &c. be in the name of the executor of B; and neither of the heir or assignee; and that which is recovered will be assets in law to charge the executor as I take it; yet in equity it pertains to the heir or assignee. *quere*, If the executor meddle not, but only suffer his name to be used," *Wentworth off. Ex. 74*. In another place, he has a passage to this effect, "Many have bonds, statutes, or recognizances for warranty or enjoying of land, or freeing &c. from incumbrances in general, or particular. Now he which hath these, selling the land, may by letter of attorney lawfully assign them to the party who buyeth land or lease: but this notwithstanding, the interest remains in him who selleth, and by his outlawry they may be forfeited, or by himself released, any bond to the contrary notwithstanding; and if he die, the interest in law will be in and go to his executors, and in their names only suit or execution may be had or maintained. But if the vendor besides assignment makes as to the obligation &c. only the vendee executor, by this the interest after the death of the party will be in him actually &c. since none but he can release or discharge, nor any other name need to be used to sue or take benefit thereof." *Ibid. 12*

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These passages prove, that bonds for conveyances, and assurances do not, like covenants in conveyances, run with the land, and become the property of the heir; but belong to the executor, and if so, the naming of the heir is mere surplusage, and gives him no right of action.

This doctrine is attended with no inconvenience to the heir, whether the breach be before or after the ancestors death: If before; the execu-

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tor will recover damages for that breach, and a *scire facias* for future breaches may be brought in his name upon the judgment, until the whole penalty is exhausted; which like the Governor, Justices and other public officers he would not; perhaps, be allowed to release. If after; the heir must, indeed, make use of the executors name in bringing the suit, but the recovery will be for his own benefit. So that his interest is sufficiently protected.

It was said that the *nomine pæne* in a lease may be sued for, and recovered by the heir in his own name; which the appellees counsel insists is analogous to the present case. But that is not so.

For the *nomine pæne* like the rent, it is incident to the reversion, and descends to the heir at Common Law. It waits on the rent, and cannot be released until the rent is behind: Non payment makes it a duty. *Relv. 215. 4. Bac 285.*

The argument, that the act of Assembly by declaring that the penalty shall be discharged by payment of the damages found, does in effect destroy the distinction between debt and covenant, has no weight with me. For that act does not alter the nature of the action, but the same judgment for the penalty is still preserved by the act, and a collateral relief only given, in order to prevent the necessity of applying to a Court of Equity. So that the act, instead of confounding the distinction between them, does in express terms support it.

There must have been many bonds for conveyances and assuring of titles in England, yet there is no precedent of any suit or declaration, by an heir, upon such a bond; and if no such precedent can be shewn, then, according to *Littletons* rule, it is a good argument, that an action lies not, because one was never brought.

I am therefore of opinion that there is no error; and that the judgment ought to be affirmed.

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PENDLETON President. The bond is to Peter Eppes, his heirs or executors, to operate in succession, and not to any two at the same time; to Peter during his life, in which no breach was made, and at his death it became payable to one of his two legal representatives, and not to both. So that the objection that the obligee was liable, at the same time, to be sued by two different persons, does not seem to have any force. The paper and the remedy can belong only to one; and the question is, to which? The heir is as much the legal representative of the testator as to the real estate, as the executor as is to the personal; and, with the land, the heir takes all deeds, and writings relating to them, whether for conveying the title or protecting his quiet enjoyment; with none of which could the executor intermeddle, as it is laid down by *Bacon* in his second volume 421 (from *Roll's abr.* 919. and *Wentw.* 63,) where he is professedly treating of the distinct rights of the heir and executor.

The same author in his 3d. vol, 20. treating of the rights of the heir to take advantage of the conditions or covenants made to the ancestor, lays down this general principle, "conditions and covenants real, or such as are annexed to estates, shall go to the heir and he alone shall take advantage of them." In a note he makes this obvious distinction that in case of a breach in the testators lifetime it shall go to the executor; the land being gone and the substitute money. But we are embarrassed by the term penalty; which is money; was a debt from the date of the bond; and therefore, at law, must go to the executor.

This, if it could be true, would wholly derange the principles laid down by *Bacon*: And how is it proved? I consider it to be the same as timber on the land; if severed in the testators life time

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time it will go to the executor; if growing it will belong to the heir. It is laid down in *Co. Litt.* 292, that if a man be bound by deed to pay another a sum of money at a future day, a release of all actions before the day shall be a bar; because the debt was a thing in action, and although he could not sue, because it was *debitum in præsentia, solvendum in futuro*, yet since the right of action was in him, a release of all actions was a discharge of the debt.

Penalties in their nature follow the subject they are intended to enforce: And the case put of *nomine pænæ* 3d Bacon 20. applies directly in terms; since he states the case of a penalty to enforce the payment of rent; which (that is the penalty) he says ought in reason to go to him who has a right to the rent. So, in the present case the penalty is to go to him who lost the land intended to be protected by it. But it is said that there is no instance of a suit by the heir for a penalty. I have not searched for the precedent; but believe it would be, at least, as difficult to produce one, of an executor's suing for the penalty of a bond, which had a condition for quiet enjoyment of land annexed to it, and the condition not broken at the testator's death.

In this case the heir has sustained the loss to be recompensed; he is named as obligee in the bond; has rightfully the possession of it; and I can find no principle of the most rigid law to prevent his recovery in the mode he has pursued.

A majority of the Court therefore is of opinion that the errors assigned to arrest the judgment are insufficient for the purpose; and consequently that the judgment of the District Court is erroneous: It is therefore to be reversed, and judgment entered for the plaintiff.

## C O O K E

against

S I M M S.

IN an action on the case, brought by Simms in the Hustings Court of Alexandria against Cooke; the declaration contained four counts. The first charged, "That the defendant made his certain writing subscribed with his hand in the words and figures following, to wit, *Alexandria January 12th, 1792, Whereas Jesse Simms of Alexandria has this day given me his obligation promising to assign, transfer and deliver to me or my order on the fifteenth day of June next ensuing the sum of five thousand dollars of the funded debt of the United States of America bearing an annual interest of six per centum, commonly called six per cent stock, I do hereby promise on receiving of the said sum of five thousand dollars of the funded debt of the United States of America, bearing an annual interest of six per centum, agreeably to his said obligation, to pay the said Jesse Simms or his order the sum of six thousand spanish milled dollars or the value thereof in gold, as witness my hand.*

"STEPHEN COOKE.

Witness, *James Gillies.*

"And in fact the plaintiff saith that he offered to perform all things on his part necessary to be done and performed." The second count was for money laid out and expended, by the plaintiff, for the use of the defendant. The third for money had and received by the defendant to the use of the plaintiff. The fourth count charged, that the defendant in consideration that the plaintiff had given unto him an obligation of him the

"plaintiff,

In an action on the case upon a note of hand, there must be an express assumption laid in the declaration; and merely reciting the note of hand in *bare verba* is not sufficient.

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" plaintiff, promising to assign, transfer and del-  
 " ver to the said defendant or his order on the  
 " fifteenth day of June in the same year the sum  
 " of five thousand dollars of the funded debt of  
 " the United States of America, bearing an annual  
 " interest of six per centum commonly called six  
 " per cent stock, undertook and faithfully promi-  
 " sed, on receiving the said sum of five thousand  
 " dollars of the funded debt of the United States  
 " of America bearing an annual interest of six pe-  
 " centum agreeable to the obligation aforesaid, to  
 " pay to the said plaintiff or his order the sum of  
 " six thousand Spanish milled dollars or the value  
 " thereof in gold; and the plaintiff in fact faith-  
 " fully that he on the said fifteenth day of June in the  
 " year aforesaid, at the town aforesaid, offered to  
 " the said defendant the said sum of five thousand  
 " dollars of the funded debt of the United States  
 " of America, bearing an annual interest of six  
 " per centum per annum, agreeable to the obli-  
 " gation aforesaid, and offered that the same  
 " should be assigned and transferred to him or his  
 " order, and required him to perform his pro-  
 " mise aforesaid, and the said defendant then and  
 " there refused to receive the said sum of five  
 " thousand dollars six per cent stock aforesaid, and  
 " refused that the same should be transferred to  
 " him." The declaration then concludes with  
 " assigning a general breach in the following words  
 " Nevertheless the said defendant though after-  
 " afterwards, required to perform his said sever-  
 " promises aforesaid and still doth refuse to per-  
 " form them and each of them, to his damage  
 " three hundred pounds, and therefore he brings  
 " suit, and so forth.

The defendant prayed oyer of the writing, and  
 then plead *non assumpsit* to the first, second, and  
 third counts; on which the plaintiff took issue.  
 And as to the first count, the defendant further  
 plead, " that the plaintiff did not assign, transfer  
 " and deliver to him or his order the sum of five  
 " thousand dollars of the funded debt of the United  
 " States,

"States of America, bearing an annual interest  
 "of six per centum per annum, commonly called  
 "six per cent stock agreeably to his said obligation."  
 And as to the fourth count the defendant demurred,  
 1. Because the plaintiff did not alledge that  
 he offered to assign and transfer the said 5000 dollars  
 of the funded debt at the *Treasury of the United  
 States*, or at the *Office of the Commissioner of Loans*.  
 2. Because the tender set forth in the declaration  
 was informal and insufficient. 3. Because it is not  
 averred that the plaintiff had a right to assign and  
 transfer the said 5000 dollars of the funded debt.

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The plaintiff as to the second plea to the first  
 count says, that he on the 15th of June 1792, at  
 the town aforesaid offered to the defendant, "the  
 "said sum of five thousand dollars of the funded  
 "debt of the United States of America bearing  
 "an annual interest of six per centum, agreeable  
 "to the obligation aforesaid, and offered that  
 "the same should be assigned and transferred to  
 "him or his order, and then and there re-  
 "quired the defendant to perform his promise  
 "aforesaid; and the defendant then and there re-  
 "fused to receive the said sum of five thousand  
 "dollars six per cent stock aforesaid, and refused,  
 "that the same should be transferred to him."  
 Then follows an entry in these words, by "con-  
 "sent of the parties, the declaration is amended  
 "to the fourth count, \* and the demurrer filed  
 "withdrawn."

The defendant demurred to the plaintiffs repli-  
 cation aforesaid to the second plea to the first  
 count. 1. Because it appeared by the plaintiffs  
 own shewing, that the offer to transfer was made  
 at the town of Alexandria, and not at the *Trea-  
 sury of the United States*, or at the *office of the  
 Commissioner of Loans*. 2. Because it appears by  
 the

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\* It does not appear in the record, that any thing further  
 was ever done, as to the amendment.



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the plaintiffs own shewing, that he hath not performed what he ought to have done in order to entitle him to his action against the defendant. 3. That it is not averred, that the plaintiff had a right to transfer the said 5000 dollars of the funded debt. The plaintiff joined in the demurrer. The Hustings Court decided in favor of the plaintiff, upon the demurrer; and awarded a writ of enquiry of damages. The jury found £ 159 damages; and the Hustings Court gave judgment for the same.

The defendant appealed to the District Court; where the judgment of the Hustings Court was affirmed; and from the judgment of affirmance the defendant appealed to this Court.

The case was argued at a former term, by Marshall for the appellant and Lee for the appellee. When the judgment of the District Court was reversed; but that judgment was set aside during the same term, and the cause continued for another argument.

MARSHALL for the appellant. The declaration does not shew a sufficient cause of action. It does not shew, with sufficient certainty, that the defendant accepted the plaintiffs obligation; without which there was no consideration. But, if it did, still the plaintiff has not entitled himself to what he claims. For the mere offer to transfer was not enough. 1. *Ld. Raym.* 440, 686. 12 *Mod.* 529. Therefore the plaintiff, having omitted to shew a performance on his part, has not stated a sufficient ground of action against the defendant. But the declaration must shew a sufficient cause of action, or the plaintiff cannot recover. 4. *Bac: abr:* 6.

Nothing then can sustain the declaration unless the replication has aided it; which has been supposed, inasmuch as it is said that the declaration and replication may be incorporated together, so as to make one plea. But this cannot be done

because

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because it would be a departure. For it is a distinct matter which is set forth in the replication, from that which is contained in the declaration; and this according to all the authorities is a departure. It is a variation from the title, which the plaintiff had once insisted on; and therefore is expressly within the definition and principles laid down in 3. *Black. Com.* 310, and 4. *Bac. abr.* 122. The instances there put illustrate and confirm it. Thus in the case of the assize, where the tenant pleads a descent from his father and gives colour, the demandant entitles himself by a feoffment from the tenant himself, the tenant cannot say that the feoffment was on condition and shew the condition broken; for it would be a departure, as containing matter new and subsequent to that of his bar: Which is a case in point, and proves that the subsequent matter contained in the replication, was a departure in the present case. This doctrine is supported by 2. *Wils.* 98; and, in short, there is not a single authority which does not go to shew the same thing; and to prove, incontestibly, that the new matter, introduced into the replication here, was a departure from the declaration.

So that if it were even true, that a declaration and replication can be incorporated, it would not assist in the present case. But there is no case which goes to prove that such incorporation can be made. For that would be to allow every bad and insufficient declaration to be amended by the replication; and in short every bad prior plea to be amended by the subsequent. So that the series would be infinite; and the *endless altercation*, spoken of by the books, and which the doctrine of departure was established to prevent, would be introduced.

But there is another fatal objection in this case; namely, that no *assumpsit* is laid in the declaration. For the mere recital of the note was not sufficient. The *assumpsit*, which the law raised, ought

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ought to have been averred: Because the promise is the very gist of the action, and therefore should be stated. 1. *Lev.* 164. 2. *Ld. Raym.* 1516. 2. *Wasb.* 187. Which last case is an express authority in the very point; and the same doctrine was afterwards held in the case of *Chichester vs Vass* \* in this court. If the English books of practice be consulted, no form will be found which omits an averment of the implied promise. So that as well upon the authority of adjudged cases, as upon the forms in use, it is clear that the failure to state the assumpsit is an incurable error.

But the judgment is erroneous upon another ground. There were two pleas to the first count; the first a general plea of *non assumpsit*, and the second a special plea. Upon the former the parties were at issue; and notwithstanding this, the court, on overruling the demurrer, have proceeded to enquire of the damages, without trying, or otherwise disposing of the issue upon a good and sufficient bar. Which is manifest error; because the defendant had a right to insist on having his plea tried.

*CALL contra.* The declaration and replication may be incorporated together and taken as one plea. For all the pleadings of the party is but one exposition of his case. The replication operated like an amendment to the declaration, and might supply the omissions and deficiencies in that. *Xelv.* 18.

The replication is not a departure from the declaration: Because it is every way consistent with it; and may be said to grow out of it. For the declaration charges a general offer of performance on the part of the plaintiff; and the replication only extends the allegation and shews how he offered to perform. It is therefore within

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\* 1. Call's rep. 83.

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in the reason of all the cases upon pleadings; which admit that the replication may explain the generality of the count. 5. *Com. Dig.* 438. Besides the plea here rendered the replication necessary, because it denied the transfer; which denial was true; and therefore the plaintiff was obliged to confess and avoid, or the bar would have precluded him. It is therefore within the reason of the doctrine of new assignments: Which were never held to be a departure merely because they stated a new fact.

It is not true that because additional matter is added it is therefore necessarily a departure. On the contrary even surplusage, although containing additional matter, is not. 3. *Term. Rep.* 376. Which shews that every thing consistent with the declaration may be united to it, and the rest rejected. The case in 2. *Wils.* 8, explains the nature of departures, and was a stronger case than this; because there the defendant might have taken issue on the replication; but here it was absolutely necessary to answer the defendants bar; and a necessary answer to the opposite plea is never considered as a departure. 5. *Com. Dig.* 438.

The replication contains a sufficient cause of action: Because the offer to transfer was enough, when the defendant refused to accept. For the case is very different from that in *Ld. Raym.* 441; because here the offer was to the defendant himself, which the court in that case allowed would have been sufficient.

There is a sufficient *assumpsit* laid; because the note itself contains an express promise; and it is immaterial how the promise is stated, provided it be laid at all. For the only object, in stating it, is to shew that there was an agreement to pay. But no particular set of words is required. It is wholly immaterial what expressions are used, if the agreement be actually shewn. But you cannot render the agreement more certain by any other

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other form, than by a recital of the very words of it; which, as the end of all pleading is only to inform the adversary with what he is charged, is the least exceptionable mode, and most certainly effects the desired object. The case of *Buchler vs Angel*, 1. *Lev.* 164, does not oppugn these observations; because in that case there was no express promise stated; and for want of it, the declaration was nonsense. The same observation applies to 2. *Ld. Raym.* 1516; and perhaps, in both cases, the omission, at this day, would be considered as a mere *vitium clerici*, not affecting the judgment. There is probably some omission in the statement of the case of *Winston vs Francisco*. 2. *Wash.* 187; but at any rate, there was no recital of an express promise in that case, as there is in this; nor did the replication there repeat the promise as it does here. For if it had the recital would have been sufficient, *Euers plead.* 45. As to the case of *Gibchester vs Vass*, the failure to lay an assumpsit was not the ground of decision there; but the omission to aver what sum the other daughters received. In short, after stating the express promise, it never can be necessary to repeat the assumpsit which the law raises. For what purpose should this be done? No use can result from it; and it would only tend to create a redundancy of words, and to fill the record with needless repetition.

As to the last point, relative to the enquiry of damages without trying the issue; it does not appear that the defendant asked for a trial; and his omission to do so, must be considered as a waiver of the plea of *non assumpsit*.

MARSHALL in reply. The case in *Yelv.* 18. does not apply, because the replication there would have pursued the declaration; but here the foundation of the action is the refusal in the defendant to take the stock; and that is nowhere stated before in the declaration. For the declaration merely is, that the plaintiff offered to perform

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form all the things on his part to be performed, and says nothing of the refusal. Which is not drawn forth in the replication by any thing contained in the plea of the defendant; which in fact was but a mere denial of the declaration. None of the cases cited by the appellees counsel come up to this, which was a clear departure. For it introduced new matter, without any necessity for it from the adversary pleadings. The form of declaring in England is, to state the promise which the law raises, although the promise in the contract be previously stated. 1. *Rich. prac: K. B.* 119. And the cases cited before, particularly that of *Winston vs Francisco*, 2. *Wasb.* completely prove that it must be so laid. There was no necessity for the defendants asking for a trial of the issue; because the plea stood upon the record and the court ought to have taken notice of it.

CALL. In the form in 1. *Rich. prac:* it was necessary to lay the second promise, as the plaintiff counted on the statute; for, if he had counted at Common Law, he must have shewn the consideration of the note. Therefore the second promise laid in that declaration was the *assumpsit* which the statute raised; and without which he could not have recovered. But here was not the same necessity; because there is a good consideration expressed in the note itself.

*Cur: adv: vult:*

PENDLETON President, delivered the resolution of the Court.

The objection to the declaration for want of laying a promise directly, if stirred by the counsel on the former argument does not appear in our notes. We know it was not considered by the court; but the case was decided upon other points which are unnecessary to be considered if this be against the plaintiff.

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The declaration is, that the defendant *made the note*, which it recites in *Hæc Verba*, without alleging any other promise than that contained in the note itself; and the question is, whether, independent of the act of parliament in England and of our act of Assembly (neither of which apply,) an action on the case will lie on a promissory note singly, without adding a promise?

The cases produced, and two others coming more directly to the point *Clerk vs. Martin*. 2d *Ld. Raym.* 757, and *Burton vs. Souter* in the same book 774, prove that it will not: but that the declaration must lay an *indebitatus assumpsit* according to the form in the attorney's practice in the K. B. and give the note in evidence.

Although it is difficult to justify the rationality of this opinion, yet since it is the law, and as such has been recognised by this Court in former cases, it ought not to be stirred again. For my own part I can yield to it, without reluctance, as a point of little consequence in this country, where an action of debt is usually brought.

This count in the declaration then is bad; and judgment is to be entered for the defendant upon the demurrer. But what is to be the consequence? Is a final judgment to be entered for the defendant, as if this was the only count, when there are three others, on which there has been no decision by court or jury? Or shall our entry be, that the plaintiff take nothing by this count, but the defendant as to that, go without day, and recover his costs occasioned thereby; and that the cause be remanded for further proceedings on the other three counts, so as to enable the plaintiff to recover, if he can support his action upon either of them?

Our present impressions are that the latter is the proper mode.

The

The following judgment was afterwards entered.

"The court is of opinion that the judgment of the said District Court is erroneous. Therefore it is considered that the same be reversed and annulled &c. and this court proceeding to give such judgment as the said District Court ought to have given, is of opinion that the judgment of the said Court of Hustings is erroneous, in this, that the law is for the appellant on the demurrer joined to the replication of the appellee, to the appellants plea put in to the first count in the appellees declaration, which as to that count is insufficient to maintain the appellees action. Therefore it is further considered that the said judgment be also reversed and that the appellee take nothing by the said first count, &c. And the cause is remanded to the said District Court for further proceedings to be had therein as to the other counts contained in the declaration."

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## HUNT

*against*

## WILKINSON,

**W**ILKINSON brought debt, in the County Court of York, against Hunt, as administratrix of Charles Hunt deceased, and at the June rules obtained an office judgment. At the succeeding Quarterly Court, on the motion of the defendant the office judgment was set aside, and she was permitted to plead. After which the record proceeds thus, "Whereupon by her said attorney, she comes and defends the force and injury &c. and saith, That since the institution of this suit, and during the pendency thereof, and since the last continuance thereof, to wit,

*Plea puis darrein continuance may be pleaded after office judgment, and before the end of the next quarterly term.*

*Administratrix, with the will annexed, must be sued in that character; and if*

"on

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and as admi-  
nistratrix only  
without the  
addition of the  
wards, with  
the will annex-  
ed, she may  
plead in abate-  
ment.

"on the twentieth day of July in the year of our  
" Lord one thousand seven hundred and ninety  
" five, the will of Charles Hunt deceased, du-  
" ly authenticated and proved, according to the  
" form prescribed in England, one of the coun-  
" tries out of the limits of the Commonwealth of  
" Virginia, was committed to record by this  
" worshipful Court of York County, and by the  
" said Court administration with the said will an-  
" nexed was to this defendant, in due form of  
" law, committed; whereby she became bound to  
" surrender her letters of administration, granted  
" to her by the Court of Hustings for the city of  
" Williamsburg before the appearance of the said  
" will; in which case she ought to be sued as ad-  
" ministratrix with the will annexed of Charles  
" Hunt deceased, and not as administratrix, as in  
" the plaintiffs writ and declaration is alledged;  
" and which is according to the letters of admi-  
" nistration committed to her by the said Court  
" of Hustings; and this she is ready to verify:  
" Wherefore she prays judgment of the said writ  
" and declaration, and that the same may be  
" quashed.

The plaintiff objected that the plea ought not to  
be received; but was overruled by the Court,  
and thereupon he filed a bill of exceptions to the  
Court's opinion, and then demurred to the plea.  
The defendant joined in demurrer, and the County  
Court gave judgment for the defendant, "that  
" the plaintiff should take nothing by his bill, but  
" for his false clamour be in mercy &c. and that  
" the defendant should go thereof without day and  
" recover her costs."

The District Court were of opinion, that the  
judgment of the County Court was erroneous, 1.  
because that court permitted the defendant to  
set aside the office judgment, obtained by the  
plaintiff against the defendant, by filing a plea in  
abatement of the writ; which delayed the plain-  
tiff's action, and, as a plea *puis darrein continu-*

*ance,*

ance, was inadmissible; the defendant not having previously filed any plea, and the suit not having been continued. 2. Because the office judgment could not be set aside, under the act of Assembly establishing District Courts, without filing such an issuable plea, as would bring the merits of the case before the court. They therefore reversed the judgment, set aside the plea and all proceedings subsequent to the office judgment, and remitted the cause to the County Court, for other proceedings to be had therein; with directions, not to permit the defendant to set aside the office judgment, unless she filed such a plea, as would not delay the plaintiff in the prosecution of his suit, and would bring the cause before the court upon its merits.

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From which judgment the plaintiff appealed to this court.

WICKHAM for the appellant. 1. If the plea was a good one the County Court did right in receiving it. For a plea in abatement may be filed *quis darrain* continuance; and the act of Assembly, relative to setting aside office judgments, does not take away the right. Like all other rules it has its exceptions, and its operation is to be regulated by circumstances. As if the parties or either of them die; or their functions cease, as in this case; or, in short, if any thing happen, which may render the plea essential to justice.

2. The plea was good. For the Court of Hustings had no authority to grant the administration at the time, as a will afterwards appeared; because the probat relates back to the death of the testator and avoids the prior administration, so that a judgment obtained by the administrator is utterly void; although such administrator, for any thing rightly done by him, may recoup in damages. 2. *Bac. ab.* 411. cites *Graysbrook* and *Fox*, *Plowd.* 277. 279. If a suit is brought against the first administrator, and afterwards a second administration is granted pending the suit, the writ

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writ will abate. 11. *Ven. abr.* 14: And the rule ought to be reciprocal. If an executor is sued as administrator he may plead in abatement; because the will may change the disposition of the assets: And the same argument holds here. But another reason why the suit should abate is, that it may affect the securities to the first administration, and render them liable, for the conduct of the defendant under the second.

CALL *contra.* 1. The second administration, by the County Court of York, did not controul or rescind the first by the Court of Hustings. For one concurrent court cannot repeal the acts of another; *Wooldridge vs Wooldridge* in this court. Therefore the application should either have been to the Hustings, the District, or the General Court.

This, which is true upon principle, is more consistent with public convenience, and avoids infinite difficulties. For otherwise, if there be a contest about an administration in one court, and it is there granted to the proper person, the party failing may apply to another court without notice and obtain it; by which means, according to the doctrine contended for, he will repeal the first. So if a wife or distributee refuse in one court, and administration is thereupon granted to a creditor, they may afterwards apply to another and obtain it, to the repeal of the first letters; or at least, there will be the absurdity of two administrators of the same estate, deriving their authority from different courts, and each claiming the exclusive right to administer. Which inconvenience cannot happen, if the application is confined to the same or a Superior Court; because either may grant a *supersedeas* to the first letters.

2. But if the application to York court was regular, yet the second administration did not abate the writ. Because a writ shall never abate, unless the matter, set forth in the plea, proves that the condition of the party would be changed. But  
here

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here it would not; for she could make the same defence to this suit, that she could to a new action. Therefore the law will not turn the plaintiff round, for the mere addition of the words, *with the will annexed*. Besides it is a rule, that a suit shall not abate, by subsequent matter, without the plaintiff's fault: as if a *feme sole* marries; the defendant is knighted; or an executor *de son tort* becomes administrator during the progress of the suit, *Williamson vs Norwick*. *Styles* 337. The second administration therefore did not abate the writ in the present case, where there was no fault on the part of the plaintiff; whose suit was rightly begun.

It is a rule, that every plea in abatement must give the plaintiff a better writ. But this does not; for, if a suit (brought against the defendant to day) should call her administratrix only, without the addition of *cum testamento annexo*, it would be good. So that the only effect of the plea would be to take this suit off the docket, and put the plaintiff to bring another in the very same form, without any reason for it.

By analogy to other cases, the point is clearly in favor of the plaintiff; because the law frequently allows defective process to be made good, by subsequent events: As in the case of *Humphries vs Humphries*, 3. *Wms.* where a suit was brought by one as administrator, who at the time of suing out the writ was not administrator, but afterwards qualified as such; and this was held to sustain the writ. So in the case of a suit by a *feme sole* who marries, which by law abates the suit, yet if the husband dies before the return day of the writ, its capacities are restored, and the suit sustainable, *Brook ab: 108. pl. 134*. Therefore, if the appellants counsel was right in his position, that the first administration was void, yet the subsequent grant of administration by York Court sustains the writ.

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Again the Court never turns a party round for the sake of form; but, if no inconvenience will result from it, they will do justice, in the first instance, without regard to technical mistakes. Now in the present case, if the suit were abated, it might instantly be revived by a writ of *Journeys accounts*; and the defendant would be obliged to plead fully administered upon the day of the first writ purchased, and not upon the day of purchasing the writ of *Journeys accounts*. 1. Bro. abt. 16 pl. 14. Of course the Court will not abate the writ, merely for the sake of putting the plaintiff to the formality of suing his writ of *Journeys accounts*.

With respect to the argument drawn from the case of *Graysbrook vs Fox*, if it proves any thing, it will conclude against the defendant. Because, according to that case, the *probat* establishes the right of the executor against every body; and therefore, as the plea does not state the renunciation of the executor, the second letters are as void as the first. Consequently the attempt of the defendant, to avoid one void act by another, will not prevail.

WICKHAM in reply. The County Court of York might properly grant administration; and no express revocation of the prior administration was necessary. Which shews, the fallacy of the argument on the other side, because that proceeds upon the idea of an express revocation being requisite. The matter set forth in the plea did change the condition of the defendant; and therefore was proper to be plead in abatement of the writ. The subsequent act, which abated the writ, was not the act of the defendant; but it was a consequence of law drawn from the *probat* of the will. It is not correct to say, that a writ against the defendant, as administratrix merely, without adding the words, with the will annexed, would be good. For that addition is absolutely necessary. It was not requisite to state the renunciation of the executors; for that is presumed

sumed, in favor of the judgment of a Court, until the contrary is shewn.

ROANE Judge. Was of opinion, that the judgment of the District Court ought to be affirmed.

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FLEMING Judge. There are two questions in this case. 1. Whether such a plea as this will abate a suit at all? And if so, 2, whether it could be pleaded after an office judgment?

With regard to the first question, it seems to me to stand precisely on the same ground, as if the administration, with the will annexed, had been granted to some other person; and in that case, I think it clear that it would have abated the suit. Because in her first character of general administratrix she was bound to administer and make distribution according to the directions of the statute; but when the will was annexed to the second administration it was necessary to conform to that, as far as the nature of things would admit of. In addition to which, the securities to the first administration would continue liable for the result of this suit, although the functions of the defendant, as general administratrix, had actually ceased. Which never could be right. I think, therefore, that there was such a change produced by the second administration, as ought to have abated a suit brought against the defendant under her first character. For as to the objection that the second administration was granted by a concurrent court, there is no weight in it. Because the *probate* of the will *ipso facto* repealed it; and the act of Assembly directs, that if, after administration has been granted, any will shall be produced, and proved by the executors, or the wife or other distributee, who shall not have before refused, shall apply for the administration, the same shall be granted, in like manner as if the former had not been obtained.

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So that the second administration with the will annexed was a complete supersedeas to the first, by the necessary construction of the act of Assembly. Under every view of the case therefore I think the matter was sufficient to abate the suit.

But as it happened after the office judgment and before the end of the succeeding Quarterly Court, it could only be pleaded in the form of a plea *puis darrein continuance*. For, as it did not exist at the time of the office judgment, it could not then be pleaded; and of course, unless it could be pleaded in this form, it could not be taken advantage of any how; although we have seen that such matter would abate the suit.

Upon the whole I think the judgment of the County Court was right; and consequently that the judgment of the District Court was erroneous, and ought to be reversed, and that of the County Court affirmed.

CARRINGTON Judge. It has been rightly stated that there are two questions in this case.

1. Whether a plea in abatement could be received after an office judgment and before the last day of the succeeding Quarterly Court, so as to abate the suit and put the plaintiff to a new action?

2. Whether the plea, tendered in York court, was such a plea as ought to have been received to abate the suit at that stage of the proceedings?

As to the first;

I am clearly of opinion that a suit is abateable at that stage of the proceedings; because the suit was pending until the last day of the succeeding quarterly term. At which time there must be a plaintiff and defendant in existence; that is to say, the original plaintiff and defendant in their primary characters must still exist, or the judgment cannot be confirmed, and execution had.

Suppose

Suppose a feme sole brings a suit, and afterwards marries between the judgment at the rules and the end of the succeeding term, a plea to that effect would abate the suit; because there would then be no such person in existence as that named in the writ. So if either party dies, this fact may be plead in abatement, for the same reason.

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Nothing therefore can be clearer in my judgment, than that a plea of matter of abatement happening between the day of the office judgment, and the last day of the succeeding quarterly term, may be plead.

Which brings me to the second question;

In this case at the time of the office judgment, Mrs. Hunt was defendant in her character of general administratrix; but, before the end of the next term, that character had ceased, and all her powers in that capacity were done away and destroyed by the production and proof of the will. So that she was no longer general administratrix, but was then acting in a character correspondent to that of executrix, charged with the execution of the will, instead of the statutory administration: And the will might have contained a very different provision for the payment of debts, than that directed by law in the case of an intestacy.

Besides, upon all judgments an execution necessarily follows, or the judgment would be of no use to the plaintiff. Now, in the present case, if a judgment were rendered, how would the execution issue? Not against the estate in the hands of the general administratrix to be administered, because there would be no such character in existence, conversant in the administration. In such a case the officer would not and could not have obeyed the precept. Neither could it have issued against the estate, in her hands to be administered, as administratrix with the will annexed. Because the execution must have pursued the writ,

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and the clerk neither would, or could have varied it from the terms of the record. The judgment therefore would have been wholly useless.

Under every point of view then, I think the proceedings of York court were correct, and that those of the District Court were erroneous. Of course I am of opinion that the latter should be reversed, and the former affirmed.

LYONS Judge. Concurred that the matter of the plea might be pleaded after the office judgment and before the end of the next term; and added that if an executor were confined to the strict words of the act he might be ruined.

PENDLETON President. The first question is, whether under the act of Assembly, which annexes a condition that the defendant shall plead to issue immediately, an office judgment can be set aside upon a plea in abatement?

On this point, I am of opinion, that a plea in abatement may literally answer the description, as well as a plea in bar; and that the intention of the law was to leave a discretionary power, in the court, to stop all dilatory and frivolous pleas calculated for delay; but to admit all fair ones either in bar or abatement: and such have been the sentiments of this court on former occasions. In *Downman vs Downman's ex'rs* 1. Wash. the plea was of a former tender, of money generally, and not of paper whilst it was lawful money, as it should have been; but as the plea was not to be received without the money, and the defendant offered in support of the plea paper not then lawful money, it was the same as if he had offered leather or pebbles. On that account the court refused to receive the plea; which this court affirmed. In the case of *Kilwick vs Maidman*, 1. Burr. 59, the legal day of pleading was past, and no plea could be received, but by favour of the Judge; who had a right to impose his own terms,

and

and to judge, afterwards, whether his intention had been complied with.

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But in the case now under consideration, the defendant at the proper time claimed a legal right, and was not asking a favour; the cases are therefore perfectly distinguishable.

Every argument for receiving pleas in abatement in general, where they are fair, applies *a fortiori* to such as are of facts happening since the last continuance; as they could not have been pleaded at any prior day.

This plea was therefore properly admitted, by the County Court of York; and we come upon the demurrer to consider the second question; which is, whether the matter pleaded abated the suit?

II. If the administration with the will annexed had been granted to a third person, there could have been no doubt; since, her authority being at an end, all pending suits, against her as administratrix, must have ceased with it; but the difficulty arises from the second administration having been granted to herself; as she is to be still sued, although in a different character.

Does this make any essential difference? It was said, by the counsel, that she might still be declared against as general administratrix, without adding the words, *with the will annexed*; and if he could have maintained that position, he probably would have succeeded; since a suit ought not to abate, when the same declaration may be filed in a new suit, unless the cause of action arose after the suit was brought. No authority is produced; and upon principle, she ought to be declared against in her true character.

The grant of administration being founded on a supposition of intestacy, when a will appears the administration is void *ab initio*. Upon legal grounds, how far *mesne* acts are to be confirmed need

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need not now be considered, as not concerned in the present dispute: which is only how the creditors shall proceed against this administratrix? Every reflection on the law and reason of the case produces a conviction on my mind, that she ought to be sued in her new and real character.

She is a substitute for the executor; takes the same oath to perform the will; and gives the same bond with new security. By which the first sureties were discharged: But who might be still involved, if creditors might proceed upon that administration.

The result is, that the District Court erred; Their judgment therefore is to be reversed, and that of the County Court affirmed.

On a subsequent day of the same term, Randolph for the appellee solicited another argument of the cause; whereupon the judgment was set aside, and the cause continued until this term:

WICKHAM for the appellant. Said he relied upon the arguments he had used, and the authorities he had cited at the former hearing, and hoped that they would be sufficient to reverse the judgment of the District Court.

RANDOLPH for the appellee. It is perfectly clear that the second administration produced no alteration in the condition of the defendant; because an administrator with the will annexed may make the same defences and do every thing which a mere administrator may do. The addition of the words *with the will annexed* are therefore immaterial, and superfluous. Accordingly amongst all the books of entries no precedent is found, where the defendant is called administrator *with the will annexed*; neither *Rastall* or *Lilly* has such a form; although there are some, where the plaintiff is called so. Which perhaps is necessary in order that he may shew his letters testamentary. There is a strong case in 11. Vin. 334. pl. 41, to shew that calling the defendant administrator

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Administrator only is sufficient to cover the letters testamentary; and although, in *Moor*. 618, it was doubted, whether if the real administrator return during the pendency of a suit with the administrator *durante absentia*, the suit shall abate, yet it was afterwards decided that it should not. *Doctr. placitandi*, (new edition) 502. Which serves to shew the privity between the first and second administration: A point more fully illustrated in 3. *Bulstrode*. 112; in which Doddridge Justice relied, very much, upon the distinction, between the case, where the administration comes to the same person, and where it comes to a different person. The 5. *Vin. ab.* 107. *pl.* 4, and the same book 119. are also strong, upon the general doctrine. The principle of the decision in *Salk.* 296, deserves to be considered; and 6. *Co.* 19. has reasoning very applicable to this case, and strongly marking the privity betwixt the first and second administration. The situation of the securities to the first administration is not affected; especially with regard to creditors. Because the testator cannot vary the rights of creditors by his will. So that every fair transaction for the benefit of creditors done under the first administration will be justified and maintained by the law: As therefore it is manifest that no injury can result to any person, the judgment of the District Court ought to be affirmed.

WICKHAM in reply. The words *with the will annexed* were not conceived by the court at the last term to be immaterial and superfluous. It was said then, by Mr. Call, that the defendant pleading in abatement must give the plaintiff a better writ; and that could not be done here, because a suit against her as administratrix would be good now. But the rule of law is not that the defendant should give the plaintiff a better form of a writ, but merely that he should give the plaintiff a better writ. Which the defendant did here; because a new writ against her after the second administration, when she became invested with the authority

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thority of the will, was a better writ. It is clear law, and was fully proved by the authorities cited at the former argument, that the subsequent probat of a will rendered the prior administration *void ab initio*. Which expressly applies and shews that the functions of the administratrix under the first letters were totally superseded; and of course that no suit could proceed against her. As to the argument, that there is no alteration of situation with respect to the creditors, because the testator cannot by his will vary their rights, the very same doctrine would apply to the case of every administration revoked by a subsequent qualification of an executor; and yet it never was contended but that the executor in that case might plead in abatement. And the rule is right too; because there may be special provisions under the will even with respect to creditors which the executor or administrator with the will annexed may be bound to observe. It is not enough for the appellees counsel to say he has not found a form of a declaration against an administrator *with the will annexed*; But he should shew, where it ever was decided, that it was unnecessary to add those words. As to 11. *Vin.* 334. *pl.* 41, it does not appear, when the exception was taken; and perhaps it was after verdict. If *Moor* 618 had been decided it would have had no influence; because it was the case of a rightful administration; and therefore not void *ab initio* as in this case. *Doctr: plac.* 502 admits of the same answer; and perhaps the law of that case may be doubted. What is said in 3 *Bulstrode*. 112, was mere conversation between the judges; the case was never determined; but was ultimately compromised. Besides, in that case, the sheriff had levied the money, and therefore owed it to the plaintiff. The case in 11. *Vin.* 107. *pl.* 4, was that of a rightful administration and therefore the second administration was only a continuance of the first: The same book 119, only proves that acts already performed by a rightful administrator remain good;

and

and the whole difference is between an administration rightfully or wrongfully granted. *Salk.* 296 only decides that the plea should have been in abatement instead of bar; and 6. *Co.* 19, was a case of a rightful administration; So that the subsequent administration, did not render it void *ab initio*, as the probat did here.

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This doctrine is not attended with any inconvenience to administrators before probat; because they may *recoup* in damages; and thus are in no danger of suffering.

**RANDOLPH.** The first administration was lawful by the act of Assembly, and therefore all arguments, drawn from its being a wrongful administration, are irrelevant.

**WICKHAM.** The act of assembly makes no difference; it does not alter the common law and legalize mesne acts. *Cowp.* 371. has a case against an administrator with the will annexed; which shews the practice there is to add those words.

**ROANE Judge.** There are two questions in this case 1. Whether, this action, against the appellee as administratrix, is abateable by pleading, at any time, her subsequent qualification as administratrix *with the will annexed?* 2. Whether a plea of this kind is admissible on setting aside an office judgment?

The first question is difficult, and I am not prepared to decide it: Indeed it is not necessary to be now decided; since I am clearly of opinion that the plea in question, be the other point as it may, was not a sufficient plea, at the time, and for the purpose for which it was offered.

The act establishing County Courts (*Rev. Cod.* page 95. §. 29) directs that where any final judgment shall be entered up in the office, against any defendant or defendants or their securities, or against any defendant or defendants and sheriff

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or other officer by default, execution may issue thereon, after the next succeeding Quarterly Court, unless the same shall be set aside, during such Court, in like manner as office judgments in the District Courts may be set aside.

And by the District Court law (*Rev. Cod. page 85. §. 29*) every judgment entered in the office against a defendant and bail, or against a defendant and sheriff, shall be set aside, if the defendant at the succeeding court shall be allowed to appear without bail, put in good bail, being ruled to do, or surrender himself in custody, and shall plead to issue immediately &c. Upon the construction of these two clauses, the decision of this question will depend.

By the first clause it is provided, that an execution may issue upon an office judgment, after the succeeding Quarterly Court, unless set aside during such Court. This proves that the office judgment is, in itself, a complete judgment, and that no subsequent act is necessary to perfect it; although the Court has power to revoke it, during the ensuing term, upon the terms prescribed by the act. One of which is that the defendant *shall plead to issue immediately.*

Keeping out of view, for the present, that the matter of abatement, now set up, happened after the office judgment, in the present case, and arguing as if it had happened before, would it have been pleadable in abatement, on setting aside the office judgment? This question will be solved, by considering the nature and effect of the plea. Its effect would be, not to try the right to the money claimed, by the plaintiff, in this action; not to put in issue the matter alleged in the declaration; finally not to make an end of the cause; but to delay the plaintiff, and, if found for the defendant, to turn the plaintiff round to bring another action against the same defendant, in another character.

Upon

Upon principle, this would seem to be unreasonable, after the defendant has lain by, and suffered the plaintiff to obtain a judgment in the office. It is the spirit of this principle which induces the English Courts to refuse to set aside a regular judgment, unless the defendant is to plead to the merits, and the plaintiff is not to lose a term, 2. *Str.* 1242. It was the same principle which induced our legislature to enact, in the act constituting the High Court of Chancery, (*Rev. Cod.* page 72. §. 29.) that "after answer filed, and no plea in abatement to the jurisdiction of the Court, no exception for want of jurisdiction shall ever after be made" &c.

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But without citing particular instances, I may say in general, that the whole system of pleading is founded upon a similar principle; and as it were, upon a gradation in the dignity of defence; so that, by a resort to a defence of a higher nature, an inferior one is impliedly waived. I need not speak more particularly, upon this point, to the gentlemen of the bar. May not then, the provision of the act, upon setting aside office judgments, have been formed upon the spirit of the system of pleading; and by analogy to the reasonable principle above stated?

Thus much upon general reasoning; but to come to the clause in question. The terms are, that the defendant *shall plead to issue immediately*. Now the term *immediately*, of itself, seems strongly to imply, that the plea is not to be a dilatory one.

It is not now necessary to decide the precise extent of the terms *pleading to issue*. But they seem clearly to exclude a plea, which, so far from putting the plaintiffs allegations in issue, shews a reason why he ought not to be answered.

It is held in *Kilwick vs Maidman* 1 *Burr.* 59, that when time is given to plead by a judges order (after the proper term for pleading has expired)

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on the usual terms of pleading issueably, that a plea of tender was issueable within the meaning of such order, but not a plea in abatement (notwithstanding in strictness it is issueable;) because it tended to delay the plaintiff. And, in 2. Burr. 782 *Foster vs Snow*, pleading issueably is held to mean such a plea, as the plaintiff may go to trial on: but in 1. Burr. 605, the defendant is confined to plead the general issue.

Resorting to these cases therefore, as a standard, a plea in abatement is excluded in the present case; and yet it is evident the terms of our act are stronger, in favour of such exclusion, than those of the Judges order, in the cases just mentioned. That I am warranted, in resorting to this standard, is evident from the case of *Downman vs Downman's ex'rs*, 1. Wash. 26; where, upon the construction of this act, the court resorted to similar cases in order to prove, that a plea of tender was an issueable plea. It would seem too, that this construction, in the English books, would hold *a fortiori* in the present case, where judgment has been regularly obtained in the office.

I have so far considered this plea, as if the matter of the plea had arisen before the office judgment was confirmed: But, in fact, it arose afterwards; and the question is, whether that circumstance will alter the case? It certainly cannot, unless we make the time when the fact happened, and not the nature and effect of the plea, to be the criterion of its competency. In support of which, there is not, even a plausible reason growing out of the act of Assembly. Nor does the defence derive any aid from the general doctrine of pleas *puis darrein continuance*.

\* For that doctrine relates to a stage of the cause prior to a judgment. Nay it is held that although such plea may be pleaded, after the jury have gone from the bar, yet it may not, after they have given a verdict. *Bull. nisi pr:* 310. And

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again if a release be given, after the verdict and before the day in bank, the defendant cannot plead it (although in bar of the action;) because there is a verdict already given in the cause, and upon another plea; and therefore the cause is determined. So that the defendant is put to his *audita quærela* to prevent execution of the judgment 4. *Bac.* 143. These cases, giving to an office judgment the effect of a verdict only, seem analogous to that before us. The difficulty is, that the act of Assembly has authorized setting aside office judgments without assigning any reasons; but it can only be, on the terms prescribed by the act.

What I have here said does not appear to me to conflict with the decision of this court in the case of *Downman vs Downman's ex'rs*, 1. *Wash.* or any other which has come to my knowledge. Otherwise, the respect I hold for the authority of this court, and the better judgment of my brethren, would induce me readily to acquiesce. I do not hold myself concluded by the decision in *Downman vs Downman's ex'rs*; because the construction of the act, in that case, was not relative to a plea in abatement, but to a plea of tender; because too, no decision was given, even upon the plea of tender, but the cause was decided upon another point; and therefore I do not consider it a binding authority in the present case.

Thus considering that decision, I have not estimated the doctrine there laid down; but hold myself free for the reasons above given, to deliver my sentiments on this question: And my conclusion is that the judgment of the District Court ought to be affirmed.

FLEMING Judge. I have heard nothing which induces me to change my former opinion; and therefore, I am still for reversing the judgment of the District Court, and affirming that of the County Court.

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**CARRINGTON** Judge. Having given my opinion fully, upon this case, at the former hearing, I shall at present take up little more of the time of the court, than merely to declare, that I have heard no argument to induce me to alter that opinion.

The defendant had a day in court at the time of her plea, and it was proper then to receive it. Suppose either party had died, between the day of entering judgment, in the clerk's office, and the next term of the court, this certainly would have abated the suit, and might have been taken advantage of by plea in abatement. Or, if omitted, and a *scire facias to revive* were brought, the defendant might have shewn cause against its being revived. In the present case, if the administratrix had been plaintiff in her first character, the defendant might have abated her suit; and, if she had obtained a judgment, she could not have taken out execution, after the establishment of the will. But if the suit would abate had she been plaintiff, it ought when she is defendant. This, being the case of an administration revoked by the subsequent probat of a will, is different from the case in 11. *Vin.* 119, cited for the appellee. An administrator covenants by his bond to surrender his letters of administration upon the appearance and establishment of a will. But, when his authority is surrendered up and gone, he is no longer administrator, and suits, for, or against him, can have no further operation. I am therefore of opinion, as I was before, that the judgment of the District Court should be reversed; and that of the County Court affirmed.

**LYONS** Judge. The English authorities, upon the questions made in this cause, are not easily reconciled with each other: And therefore I had, at first sight, some doubts upon the subject.

They seem however to agree, that where there is an actual citation of the executor, all lawful

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acts done by the administrator bind, 2. *Wentw. 140*. And if so, our act of Assembly has removed the difficulty, by fixing a time for the executor to bring in the will; which is equal to an actual citation, as he is bound to know the law. He may afterwards bring in the will and prove it, but all lawful acts, done before by the administrator, bind as much here under our law, as in England after citation. The character of the defendant in this case may therefore be considered as changed, without any inconvenience resulting from it. Whereas a contrary doctrine might involve the first securities and create mischief.

But if her character be entirely changed, and the estate by operation of law transferred to her in her new character, it seems to me that it must necessarily abate the suit; as a change of character, without any fault in the defendant, constantly has that effect. Thus all suits cease, when administration during minority ceases; and so do the actions against such administrator according to the rule in *Pigot's case*, *Brownhead vs Spencer* 2. *Brownl.* 247. 2. *Wentw.* 138. If the administration is repealed, the administrator cannot take out execution, because his title is taken away. *Ido.* 82. 2. *Wentw.* 137. An executor cannot found an action on what he did as administrator, although he be the same person and might have released; for he ought not to have an action in this manner, *Cro. Jac.* 394. 5. *Co.* 9. 33. These cases are in principle the same with that at bar, and therefore appear to me to decide the question.

It was objected that the plea should have been sooner filed. But to this I answer that the defendant had no day in Court, as the fact had happened since the last continuance as it were; and therefore was pleadable at that time. For whenever the cause of abatement happens after the last continuance of the suit it may be plead in that manner; because the defendant has no day, in Court, to plead it in any other form: And the reason is the same, where the fact happens after the

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the judgment in the clerk's office; for the defendant should have an opportunity of shewing the change in his situation; but as this cannot be done, where it takes place after the judgment in the office, he should be allowed to do it afterwards; that is to say, before the end of the next term.

Upon the whole I think the judgment of the District Court should be reversed and that of the County Court affirmed.

PENDLETON President. I believe I said, upon the former argument, that all mesne acts of the administrator between the date of his letters and the probat of the will were void. But I am now satisfied that I was mistaken in the position; and that our act of Assembly affirms all legal acts done by him during that period. In other respects I am satisfied with my former opinion; and concur, with the three last judges, that the judgment of the District Court should be reversed and that of the County Court affirmed.

Judgment of the District Court reversed and that of the County Court affirmed.

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## A L L E N

*against*

## M I N O R.

If an infant becomes security in a 12 months replevy bond, a court of equity will grant a perpetual injunction even against an as-

**A** L L E N brought a bill in the High Court of Chancery to be relieved against a twelve months replevy bond, and stated that upon the 29th of October 1788, he became security for Joseph Watson and Daniel Hawes in a twelve months bond to Payne who was assignee of Duracott administrator of Coles. That at the time of entering into the said bond the plaintiff was an infant

infant under the age of twenty one years, to wit, only 18 or 19 years of age; and therefore that the said bond was void as to him. That Payne had assigned the bond to Minor; who had sued execution on it.

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signee without notice.

The answer of Minor states, that he as attorney for Payne obtained the judgment on which the said twelve months bond was given; that the right to the same soon after devolved on Middleton and Craughton, and Payne having removed out of the state, the defendant as his attorney assigned the bond to a third person; who re-assigned to him, in order to enable the defendant to make the necessary affidavit for obtaining the execution. That he knows nothing of the plaintiff; and therefore cannot say whether he be of full age or not.

For the infant in such case having no day in the court of law, the application to the court of equity is regular.

The infancy of the plaintiff at the time of giving the bond was proved. The Court of Chancery dismissed the bill with costs; and the plaintiff appealed to this court.

**DUVAL** for the appellant. The plaintiff was an infant at the time of executing the bond, and therefore was not bound by it unless some fraud had appeared; and there is no proof of any. It will be no excuse that the sheriff did not know his age, because it was his duty to have enquired and informed himself. At all events his ignorance will not be allowed to prejudice the infant. The appellant came rightly into the Court of Equity for relief; for the twelve months having elapsed, the plaintiff could have sued execution on his own affidavit, without application to the Court, and therefore a bill in equity was his only relief.

**Appellees counsel.** Although an infant is not generally bound by his acts under age, yet he is in all cases of fraud and deception; for his age should be considered as a shield for his defence, and not as a sword for destruction: Therefore, although he may, by this plea, protect himself from injury, yet

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he cannot use it for the purposes of injustice towards others. His obtruding himself in the present case, upon the public officer, as a person of competency to contract, in order to hinder justice and procure a restitution of the property to the prejudice of others, was a fraud and deception which renders him liable on the bond; especially to innocent assignees and others unacquainted with his age; and who therefore are in no fault.

*Cur. adv. vult:*

PENDLETON President. Delivered the resolution of the Court.

That as the plaintiff had no day in the Court of Law, his application to a Court of Equity was perfectly regular; and the jurisdiction being admitted, there could be no question upon the merits: Which clearly entitled the plaintiff to relief. That therefore the decree was to be reversed, and a perpetual injunction awarded.

## S E L D E N

*against*

## K I N G.

**I**N Ejectment the jury find, " That Joseph Achilly, being seized in his demesne as of fee " of

What shall be construed an estate tail, and not an executory devise.

Testator devises, that if his wife be with child and the said child ~~lives~~ and prove a male child and lives to 21 years of age, a house shall

be built on his land, and that he shall have the privilege of part of the pasture and woodland and shall enjoy the same peaceably; and after the decease of his mother, then he gives him and the heirs of his body all his lands, houses and appurtenances, both real and personal, forever; but if the child proves a female and lives till 21 or marriage, she shall have one half his personal estate, and all his lands to her and the heirs of her body forever: But if the said child should die, then he gives to his wife and her heirs forever, all his lands, slaves, stocks of cattle, &c; and appoints her and her father executors of his will. The child proved to be a daughter. On her birth she had a vested remainder in tail, with remainder in fee to the testator's wife.

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"of the premises in the declaration mentioned,  
 "did, on the 11th day of March  $\frac{1799}{1798}$ , duly make  
 "and publish his last will and testament, wherein  
 "he devised in manner and form following to wit,  
 "And as for what worldly goods, my God hath  
 "been pleased to bleſs me withall, and after my  
 "juſt debts and funeral charges and expences are  
 "fully ſatisfied contented and paid, I give and diſ-  
 "poſe of the ſame as followeth: I give  
 "and bequeath unto my dear and loving wife  
 "Mary Achilly and her heirs forever, in man-  
 "ner as followeth, that is to ſay, if my ſaid wife be  
 "with child and the ſaid *lives* and prove a male  
 "child and lives to the age of twenty one years  
 "my will and deſire is that there be built out of  
 "my eſtate a good forty foot dwelling houſe of  
 "brick upon the land near a mulberry tree ſtand-  
 "ing between my now dwelling houſe and the river  
 "ſide and that he ſhall have a free privilege of  
 "part of the paſture as alſo privilege of the wood  
 "land ground for fencing and fire wood and he to  
 "enjoy the ſame peaceably and after the deceaſe  
 "of his mother then I give and bequeath unto him  
 "and the heirs of his body lawfully begotten for-  
 "ever all my lands houſes and appurtenances  
 "both real and perſonal; and it is my further will  
 "and deſire that the child wherewith my wife  
 "goes withall proves to be a female and ſhall live  
 "till ſhe attains of lawful age or married that  
 "then ſhe ſhall have the one half of my perſonal  
 "eſtate and after the deceaſe of her mother ſhe  
 "ſhall enjoy all my lands houſes, tenements and  
 "appurtenances to her and to the heirs of her bo-  
 "dy lawfully begotten forever. Item it is my  
 "further will and pleaſure that if the child ſhould  
 "*die* wherewith my wife now goes withall then  
 "I give and bequeath unto my ſaid dear and lov-  
 "ing wife Mary Achilly and her heirs forever,  
 "all my lands houſes negroes ſtocks of cattle, hor-  
 "ſes, ſheep, goods and chattles moveable and  
 "immoveable, alſo all my debts that is due owing

" and

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" and belonging to me in this county or in any  
" other part or place whatsoever. Item it is my  
" further will and desire that none of my negroes  
" be removed off or carried away from the plan-  
" tation whereon I now live but that they shall  
" live and be together, and lastly it is my will  
" and desire that my dear and loving wife with  
" her father be my whole and sole executors of  
" of this my last will and testament.

" That the premises in the declaration mention-  
" ed are the lands devised by the said will.

" That the said Joseph Achilly died seized as  
" afore said, before the 12th day of April 1700,  
" without revoking or altering the said will.

" That, at the time of his death, his wife Ma-  
" ry Achilly was pregnant, and soon after was de-  
" livered of a daughter who was named Achilly  
" Achilly; that the said Joseph Achilly had no  
" other issue; and that she was his heir at law.

" That Mary, the wife of the said Joseph, en-  
" tered upon, and was possessed of the premises  
" in the declaration mentioned, under the said  
" will; that being so possessed of the estate thereby  
" devised to her, she intermarried with a certain  
" John King, by whom she had issue a son named  
" John grandfather of the defendant: who is heir  
" at law to the said Mary Achilly, and to the said  
" John King her son. That Achilly Achilly the  
" daughter intermarried with a certain Bartholo-  
" mew Selden; who was possessed, in her right,  
" under the will, of the premises in the declara-  
" tion mentioned.

" That being so possessed, the said Bartholomew  
" and Achilly his wife by deeds of lease and re-  
" lease indented, conveyed the said lands to Joseph  
" Selden; which said lease bears date on the  
" twenty second, and the said deed of release on  
" the twenty third day of May 1722.

" That

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" That the said deeds of lease and release are in these words. " This Indenture &c. (setting them forth.")

That the relinquishment of the said Achilly the wife, to the said *deed of release* is in these words. " At a court held for Nansemond county May the 23d 1722, Bartholomew Selden and Achilly his wife came into court and acknowledged the above deed of release for lands &c. unto Joseph Selden, which on his motion is admitted to record; also the said Achilly being first privately examined, came into court and relinquished all her right, title and interest of in and to the said lands which is also admitted to record.

" That the said Joseph Selden on the twenty third and on the twenty fourth days of July 1722, reconveyed the premises in the declaration mentioned to Bartholomew Selden aforesaid by deeds of lease and release, indented in these words. This Indenture, &c. (setting them forth.

" That the said Achilly Selden died about the year 1722; having never had issue. That shortly afterwards, the said Bartholomew Selden intermarried with a certain Sarah Hilliard.

" That the said Bartholomew Selden, being possessed of the premises in the declaration mentioned under the conveyance last aforesaid, did on the fourth day of January 1722/3 duly execute and publish his last will and testament in writing, wherein he devised as follows. As touching all my temporal estate, and the disposition of it, I give and dispose thereof as followeth. *Imprimis.* I will that my debts and funeral charges shall be paid and discharged. Item. I give unto my beloved wife *the land I now live on*, and my land that is at Hampton during her life; but, if she proves with child, as I expect she is, my will is, that the child, lawfully begotten of my body, to inherit the land after her

decease

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"decease, to him or her heirs forever. Item it  
"is my will that if my wife should not prove with  
"child, I give all my fore-mentioned land, after  
"her decease, to my brother John Selden to him  
"and his heirs forever. Item. I give to my be-  
"loved wife two negroes called Buckroe Tony,  
"and old Tony, likewise two children called  
"Betty and Nanny. All the rest and residue of  
"my personal estate, goods and chattels whatso-  
"ever, I give and bequeath to my loving wife,  
"making her my full and whole executrix of this  
"my last will and testament.

"That the premises in the declaration menti-  
"oned are described in the said will by these  
"words, *the land I now live on.*

"That the said Bartholomew departed this life,  
"so as aforesaid possessed of the premises afore-  
"said, a few days after the execution of his said  
"will; that he had no lawful issue, and that his  
"said wife Sarah, who is named in the will, sur-  
"vived him, and lived until the twelfth day of  
"June in the year of our Lord 1778: That she  
"was possessed of the land in the declaration men-  
"tioned, and parted with her right to one James  
"Kirby, who was possessed of the same; and  
"John King son of Mary, suing a forcible de-  
"tainer, an agreement was made between them  
"in these words. Indented articles of agreement  
"made this 27th day of January 1727, between  
"James Kirby and John King both of the upper  
"parish of Nansmond county, witnesseth that  
"the parties above mentioned, for a final deter-  
"mination of all differences and law suits now  
"depending between them, have agreed, in man-  
"ner and form following, that is to say, to with-  
"draw a juror, on the forceable inquest now de-  
"pending; and the said Kirby quits claim, and  
"now, by the delivery of the key of the Mansion  
"house door, delivers in name of possession of the  
"said house and lands, that were Bartholomew  
"Selden's at the time of his death, quiet and  
"peaceable

"peaceable possession to the said King; and the  
 "said King is to pay unto the said Kirby ten  
 "pounds current money, on demand, and to  
 "finish for the said Kirby the tobacco house, now  
 "raised by the first of May next; Kirby to find  
 "nails and the said Kirby's to have the use of the  
 "hall and parlour chamber, until the said first of  
 "May; and the said Kirby's to have the fifth  
 "hoghead of cyder made on the said land, dur-  
 "ing his life, the said Kirby beating the same  
 "with his servants; and the said Kirby's to have  
 "common of pasture, in the said lands, for thirty  
 "head of cattle and horses, during his life; and  
 "both parties are to keep the pasture fence in  
 "repair, in proportion to the number of hands  
 "each shall yearly employ on the same; and the  
 "said Kirby's to have liberty to tend and inclose  
 "as much land, contiguous to the said tobacco  
 "house, as he can work with four hands, and no  
 "more, paying yearly and every year when law-  
 "fully demanded one ear of corn rent. In wit-  
 "ness whereof the parties above named have  
 "hereunto set their hands and fixed their seals  
 "the day and year above written and agree this  
 "concord shall be recorded at equal costs of the  
 "parties."

Sold  
 to  
 King.

his  
 JAMES ~~x~~ KIRBY, (L. s.)  
 mark

JOHN KING. (L. s.)

(Witnesses.)

Daniel Eelbank,  
 James Everard,  
 Andrew Meade,  
 David Osheal.

"That John King, son of the said Mary Achil-  
 "ly, entered upon the premises, in the declara-  
 "tion mentioned, in the month of January 1727,  
 "under the said agreement and as at heir at law  
 "to the said Mary Achilly, and died possessed  
 "thereof,

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" thereof, and that, from him, the possession  
" thereof hath come to the defendant, who now  
" holds them, as his heir, and as the heir of the  
" said Mary Achilly.

" That the said John King, the son of Mary  
" and those that held under him, always claimed  
" and that the defendant claims title in fee simple  
" to the premises as heir to the said Mary Achilly  
" ly and John King. That the said Kirby died  
" about sixty years before the bringing the suit.

" That John Selden, mentioned in the will of  
" Bartholomew, survived him; and made his last  
" will and testament, in writing, bearing date  
" the 27th of December 1754; wherein he devised  
" ed in manner and form following, to wit: 'I  
" give unto my son Joseph Selden my plantation  
" and tract of land, lying and being in the coun-  
" ty of Nansemond and late in the possession of  
" Bartholomew Selden, to him my said son and  
" his heirs forever; he paying and discharging  
" my bond to Major Robert Armistead for one  
" hundred and fourteen pounds."

" That the said John Selden died soon after,  
" and that he was not possessed of the premises in  
" the declaration mentioned, either at the time  
" of making his said will, or at his death.

" That his said son Joseph Selden survived him,  
" and paid off the bond to Armistead in the will  
" mentioned.

" That Joseph Selden, last mentioned, not be-  
" ing possessed of the said land, did on the 23d  
" day of December 1774, seal and execute a deed  
" of bargain and sale, whereby in consideration  
" of the sum of six hundred pounds current mo-  
" ney of Virginia, he granted *bargained* and *sold*  
" unto John Selden and his heirs, all that tract  
" or parcel of land situate, lying and being in the  
" county of Nansemond and now in the possession  
" and occupation of Doctor John King and is the  
" said lands mentioned in the will of Joseph  
" Achilly,

Achilly, bearing date the eleventh day of March 1698 and therein devised to the child the wife of the said Joseph was then big withal, which said child proved a female called Achilly Achilly, and intermarried with Bartholomew Selden, who thereupon being in possession of the said lands together with his wife Achilly by their deeds of lease and releafe bearing dates the 22d and 23d days of May in the year of our Lord one thousand seven hundred and twenty two, did convey all their estate right, title, interest, claim and demand of in an to the said lands to Joseph Selden of the parish and county of Elizabeth city gentleman and to his heirs and assigns forever, who afterwards reconveyed the same to the said Bartholomew and his heirs forever, by deeds of lease and releafe bearing dates the 23d and 24th days of July 1722, who thereupon being seized and possessed devised the same by his last will and testament bearing date the fourth day of January 1726 to his brother John Selden and his heirs forever, having previously given therein to his wife the same for life, whereby the said John Selden being entitled to the said tract or parcel of land afterwards to wit, the 27th of December 1754, by his last will and testament did amongst other things devise to Joseph Selden party to these presents as follows the said tract or parcel of land: Item, I give unto my son Joseph Selden my plantation and tract of land lying and being in the county of Nansemond and late in possession of Bartholomew Selden to him my said son and to his heirs forever, he paying and discharging my bond to Major Robert Armistead for one hundred and fourteen pounds.

"That the said John Selden died in March 1775 intestate; and that the lessor of the plaintiff is his heir at law,

"They

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"They find the lease entry and ouster in the declaration mentioned; and if upon the whole matter, the law be for the plaintiff, then they find for the plaintiff; and if for the defendant, then they find for the defendant."

The District Court gave judgment for the defendant; and the plaintiff appealed to this Court.

CALL for the appellant. Made three points:

I. This was not a remainder in the mother, after the previous estate tail to the daughter.

A contrary construction would not have consisted with the general intention of the testator, but would have entirely disappointed it in several events which might be named. Thus if the wife had had twins they would have been disinherited. For there is no provision for such a case; and therefore, the previous estates being all removed, the wife would have taken immediately. So if a son had been born, had married and died under age leaving issue, that issue would not have taken, but the wife; as in that case, there is no provision for the son.

Besides, if the child had proved a son, the wife would not have had a fee, in the event of his attaining 21, and then dying without issue; for the remainder is only limited on the estate of the daughter, and not on that of the son.

Again the wife, according to that construction, was not entitled to the personal estate; for it was a limitation after failure of issue in the daughter; who consequently took the whole interest, which on the marriage vested in the husband. But if the child had proved a son she would not have been entitled thereto, because no provision is made for her as to the personal estate in that case.

Lastly, it is wholly improbable, that the testator would have given his wife, after her death, a remote interest of this kind, in preference to his

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child, whom he had all along preferred, in disposing of the immediate interest.

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II. That it was an executory devise to the wife, to take effect on the child's being born dead, which event not having happened, the reversion in fee descended on the daughter, as heir at law to the testator.

The word *die*, in the concluding part of the devise, is to be set in opposition to the first word *lives*, in the beginning of it. For the word *lives*, is twice repeated in the beginning, and should be taken in two different senses, or else some of the words must be rejected; contrary to the known rule of construction, that effect is to be given to every word, if possible. Therefore in the beginning, the first word *lives*, is to be taken in the sense of *born alive*; and the second, in the sense of *continuing to live till* twenty one, in the case of a son, or till 21 or marriage in the case of a daughter; and it is to the first of these senses, that is to say *born alive*, that the word *die*, in the conclusion of the devise, is to be set in opposition.

The testator therefore had three contingencies in view, at the time of making his will; that is to say. 1. The birth of a living child. 2. Its arriving to the age of maturity. 3. The death of that child before its birth.

With the two first of these contingencies in mind, he considered how he should dispose of the estate, first, in case the child should be born alive, and prove to be a son; secondly, in case it should be born alive, and prove to be a daughter: In both cases predicating the disposition upon its being born alive. His reasoning was thus; if my child should be born alive, and should prove to be a son, then I give my estate this way; but if it should be born alive, and should prove to be a daughter, then I give it that way; making the limitation

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limitation in both instances to depend on the first word *lives*, in the commencement of the devise.

But, having provided for all the cases should the child be born alive, he next determines, what should be done with his estate, in case the child should die before its birth. In this case, having no dearer object to provide for, he gives the whole estate to his wife. So that, according to this construction, all the leading contingencies which he had in view are provided for; and the interest of his family preserved, with a prudent regard to events.

This mode of considering the subject is the most obvious, and results necessarily from the intention of the testator; who in the last limitation was not contemplating the failure of the issue of his daughter, but of himself; and was providing for the latter event only. But the interpretation receives additional force, from the manner of the expression. For the words used are unapt, and not so obvious as many others, for disposing of the remainder; So that they appear to have been anxiously used in order to distinguish it from a limitation, on the daughters estate.

Consequently, in the events which have happened, the wife took nothing in the lands, after her daughters death without issue; because she was only to take the fee in case the child died before its birth; and therefore her only interest was an estate for life by implication, although, as before mentioned, if the child had died under 21, and before marriage she would have taken the fee, upon the rule in executory devises, that where the prior estates are removed, the devisee takes presently; Because the events, on which the remainder was limited would, in that case, never have commenced.

This construction is preferable to the other; because it avoids the inconveniences which have been enumerated. For if a child was born, and

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lived to the prescribed period, it was provided for; and a comfortable disposition made for the mother also: If a son had been born, had married, had issue, and died under 21, he would have taken; So in the case of twins: And, if no child at all had been born, the wife would have taken the whole.

In short by this construction the testator is not made to violate nature, and act inconsistently with himself, in giving away the remainder from the issue of his blood, for whom in every other instance he shews a preference in order to bestow it upon strangers. For to strangers it must probably have gone; as the daughter was not to take until the mothers death; and therefore it was most likely that the ultimate limitation would be enjoyed by the mothers representatives, and not by the mother herself.

III. That if the last construction be rejected, then the word *die* in the conclusion of the devise is to be contrasted with the words *shall live till she attains of lawful age or married*, in the clause immediately preceding; and then it will be a contingent remainder to the wife, if the daughter should die unmarried before 21: which contingency never having happened, the remainder never vested; and therefore descended on the heir at law.

WICKHAM *contra*. Contended that it was a devise to the wife for life by implication, remainder to the daughter in tail, remainder to the wife in fee. The word *die* is to be understood as *a dying without issue*, which words the court will supply, in order to effectuate the general intention of the testator. This is the interpretation which a plain man would put upon the case; and the meaning put upon the words by the appellants counsel is artificial altogether. That the court may supply the words *without issue* is proved by many of the English cases *Spalding vs Spalding* Cro: Car: 185, 1. Will. 427. 234. 2. Vez. 194. 3. Mod. 59. But supply those words, and then it is

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is but the common case of a plain vested remainder after the death of tenant in tail without issue. As to the inconveniences mentioned, from supposed cases which might have happened, they never were contemplated by the testator, and therefore cannot be argued from. But the consequences which are contended for, would not have followed from those cases. Thus in the case of the twins it would have been considered as a *casus omissus*, and therefore the will would have been rejected in favor of them. So in the case of a son being born, marrying and dying under the age of 21 leaving issue; for the issue would have taken on the same ground. But in fact the son would have taken an immediate estate on his birth; for the contingency of his arriving to the age of 21 only applies to the privileges which he was then to have out of the estate, 1. *Burr.* 228. *Jones vs Westcomb. Prec. cb.* 316.

The argument drawn from the personal estate has no influence: for at most it only proves the testator to have attempted to create a perpetuity. But a difference of construction may be applied to the words as relative to the real and personal estate. *Forth vs Chapman*, 1. *Will.* 663.

The construction contended for, on the other side would go to establish, that there might be an executory devise after an estate tail; contrary to a known rule of law. Besides the idea, of leaving the fee to descend upon the heir at law, is repugnant to the intention of the testator; who, in the preamble to his will, professes a design to devise his whole estate.

But if the construction of the will were against us, still the plaintiff could not recover; because the lease and release did not convey the estate; for the wife was not examined as to the lease. Those conveyances however, operate merely on the possession; but here was none; and there is no privity between the releffor and releesee.

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The length of time is a bar; for the defendants and those under whom they claim have been in possession 70 years. Sarah Hillards life estate make no difference; for she parted with it, before the year 1727. The defendants ancestor, if he had no title under the will, was a disseisor; and the disseisin of tenant for life is the disseisin of him in remainder, *Co. Lit.* 250 (b.) 9. *Rep.* 105. Besides the accord here was a forfeiture of Kirbys estate; and from that time, the remainder man might have entered, *Co. Litt.* 252. (a.)

Again there was a dying seized which tolled the entry; and several of the conveyances, under which the plaintiff makes his title, were by persons out of possession; who therefore were unable to convey: Particularly by bargain and sale; which always supposes possession, 2. *Black. com.* 332.

CALL in reply. The child could not have taken before 21; for the contingency is express and runs through the whole devise; and therefore no estate in the child, upon that limitation, could come into existence until the event had happened. The case from 1. *Bur.* 228, was a case upon the known doctrine of an exception out of the general devise, *Fearn.* 438; and therefore will not apply to the case under consideration. For the devise in the present instance was not an exception, but an express condition; and therefore necessary to be performed, before the estates could arise, *Fearn.* 438-9. The argument that there can be no executory devise after an estate tail proves nothing. Because although that is true where the attempt is to create an executory devise, upon the preceding limitation in tail, yet we do not contend for this here; but that it arises upon an event independent of the estate tail, having no connection with it, and which may happen before it. In short it is a mere alternative devise altogether. If a child was born and lived till 21 in the case of a son, or of 21 or marriage in case of a daughter

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daughter, then the estate tail was to arise; which is one alternative: But if no child was born, then in that event, which is the other alternative, the executory devise to the mother was to take place. It is admitted that the remarks relative to the personal estate are correct, but then it said that ought not to prevent her taking the real estate. This however only proves what I contended for, that the construction goes to disappoint the will of the testator.

The lease and release was a sufficient conveyance. For the recital of the lease in the release made both of them the wife's deed. Besides the tenant was rightly in under the husband, and therefore the release operated to enlarge the estate: Or if the husband had no authority, then it was a discontinuance, and the release past the right.

The reversion was well conveyed by Joseph Selden to John; for the bargain and sale passed it. 1. *Bac. abr.* 275. 2. *Black. Com.* 290. *Plowd.* 154; and that another was in possession will make no difference, unless it had been adverse to the remainderman himself. The passages from *Coke* prove nothing to the contrary, as they only shew, that the remainderman may consider himself as disseised, if he will; but they do not oblige him to enter. The opinions, there stated, were introduced merely for the sake of the assize of *novel disseisin*; and therefore it was expressly held, in *Taylor vs Hord, Cowp.* 689. 703, that the remainderman might elect to consider himself disseised or not. Besides there could be no disseisin here, as the verdict states, that Sarah Hilliard parted with her right to Kirby, and that he parted with his to King; so that King was lawfully in possession and therefore could be no disseisor.

That a descent was cast makes no difference; for that doctrine only applies against one having a right of entry; which the remainderman here had not. Therefore the remainder, in the present

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sent case, was well conveyed; and the right is not barred by the statute of limitations.

*Cur. adv. vult.*

ROANE Judge. This case depends upon the construction of the will of Joseph Achilly dated on the 11th of March 1798. And, before I go into this construction, I will mention two or three principles, which I hold to be incontestable, and, under the influence of which, I think that construction ought to be made.

1. Then it is a rule, that in construing a will the intention of the testator should be collected from the whole instrument taken together; every expression should have its due weight; and, as some where said, every string should give its proper sound.

2. It is also a rule, that the construction ought to be made as at the time of the death of the testator; and ought not to be differed in consequence of a contingency, therein contemplated (but the event of which was unknown to the testator at the time,) having afterwards happened the one way or the other. This principle will take into the consideration of the present case the devise to the son (although none was in fact born,) and the consequences resulting therefrom; which must be supposed to have been in the contemplation of the testator.

3. That where the testator does not use proper technical words to express his meaning, the court may supply them, *in order to effectuate the manifest intention of the testator; and for such purpose only.*

Under the influence of these principles a difficulty arises, as to the words which are to be supplied after the words, *if the child should die*, in the ultimate devise to the wife; it being evident that some must be supplied, as a dying simply is not a contingent event, but naturally certain.

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The words, "*without issue*;" and "*under the age of twenty one*;" or in the event of there being a daughter "*before marriage*," have all been assumed; and the question is, which of them shall be adopted?

In the devise to the son, if the words, *live to the age of twenty one years*, be considered as only extending to the time, when the privilege, as to the house and part of the land, is to commence (notwithstanding the mother may be alive,) but not as a condition precedent to the vesting of his interest in the land on the death of the mother, the words in the same clause "*and after the decease of his mother then*" will have their full effect; whereas by a contrary construction those words will have no effect, in case of the son being it wler age at the time of the death of the mother. rigr, notwithstanding her death, he could not, ave succeeded under that construction; because not of the age of twenty one years.

But it would be improper to construe a provision in his favour, predicated upon the event of his mother being alive at the time of his coming of age, to narrow a right given by the same clause to succeed to the whole land, upon the death of his mother.

The intention of the testator relative to both his son and daughter (for the material words in both the devises are substantially alike as far as concerns the present question) is to give a provision by way of support, when they respectively arrive to lawful age, or the daughter marries; but he never could have meant, nor can we so expound the will, without rejecting some of his words as above, that their interest in the lands, after the death of the mother, should be postponed to the same period; and, in the event of their not attaining to lawful age, be lost. This, in the case of the son, would be to pretermitt his children, if he died under age leaving any, in

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favour of the heirs of the testators wife (perhaps by another husband;) which it is presumed the testator cannot be supposed to have intended: Especially as the wife, on my construction, has a present interest for life in the whole land, and a remainder in fee expectant upon the extinction of the testators lineal descendants.

Besides I hold it to be a circumstance of some weight, in ascertaining the testators intention, that my construction of it conforms to a very usual mode of settlement, limiting an estate for life, remainder in tail, remainder in fee.

With respect to the operation of conditional words, by way of condition, precedent or otherwise, it is not necessary to go into that doctrine; as, in this case, the intention of the testator restricts the conditional words to the privileges contemplated, and does not extend them to affect the right to the land, on the death of the mother; But if so, then upon the birth of the daughter, she had a vested remainder in tail, remainder in fee to the wife; and upon the death of the daughter, without issue, the wife, and the defendant claiming under her, became entitled to the land in question. Therefore I think the judgment ought to be affirmed.

**CARRINGTON** Judge. In the construction of wills, the testators intention should be the rule of decision. By that standard, courts should be governed, and the intention should be pursued, as far as the rules of law will permit.

To effect this object, the words of the will are in general to be attended to; but it is sometimes necessary, in order to fulfil the manifest general intention of the testator, to supply such words, as, from the general complexion of the will, compared with the situation of the testator, and of the legatees and objects of his bounty, are absolutely necessary to effectuate the purposes and dispositions intended by him.

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In doing this, too great latitude of construction on one hand, and too scrupulous a regard to the strict limits of legal rules on the other, are equally to be avoided, and a just medium observed.

In the present case, the testator, a century ago, being possessed of an estate both real and personal, and probably without relations, but having a wife supposed to be pregnant, made his will; and thereby, after reciting that he means to dispose of all his temporal estate, manifests an intention to make provision for his wife, during life in the first place; next to preserve his estate to the heirs of his own body; and, failing those, to give the whole to his wife; who, next to his own issue, was the favourite object of his bounty.

Let us consider the mode by which he intended to effect this:

First then, I am of opinion that the son, if one had been born, would have been entitled to a vested remainder in tail at his birth, to take effect, in possession, upon the death of his mother. But he would, in the mean time, on his coming to the age of twenty one, have had a right to the use of part of the lands, during the lifetime of his mother. Any other construction would have disinherited the issue of the son; which never could have been intended, by the testator.

In like manner I think the daughter, by the same rule of construction, likewise took a vested estate tail at her birth to take effect, in possession on the death of her mother. But, as she married and died without issue, a doubt arises as to the meaning of the testator by the words, *if the child die &c*, in the subsequent clause of the will.

The question is whether he meant a dying generally? or before his age of twenty one, if a son, or marriage, if a daughter? or, as Mr. Call supposed, before the birth of the child? or lastly without heirs of the body?

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He could not have meant the first, because he knew death was certain: nor the second, because the sons issue would have been disinherited, as before observed, if he had died before twenty one; nor the third, because the general tenor of his will shews he contemplated the child being born alive: Therefore he must have meant the last.

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According to which idea, the true construction is, that the testator by the latter words, *if the child should die*, referred to the preceding devise to the daughter in tail, and meant to add the words, *without heirs of her body*, but inadvertently omitted them. Therefore, in order to fulfill his intention, and carry the dispositions, he was making, into effect, it is necessary to supply those words: And then, upon the death of the daughter without issue, the remainder in fee took effect in possession in the wife.

Being of this opinion, it is unnecessary to trace the title of the plaintiff any further; or that of the defendant at all. For the defendant being in possession must remain so, until a better title is shewn. But I will add, that the defendant and his ancestors having been so long in possession, I should be extremely unwilling to disturb it, unless compelled thereto by positive law.

I am for affirming the judgment of the District Court.

LYONS Judge concurred that the Judgment should be affirmed.

PENDLETON President. We are all agreed, that death being certain and not contingent the testator must be supposed to have meant some other event added to the death, which was really contingent, and which the Court in construction must supply; but we differ about the extent of that supplement. I think he meant, the contingency of the sons dying under twenty one without leaving issue, or a daughters dying under that age, not having been married. My worthy brethren add a further

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further contingency; namely that of a general failure of issue of the children, which does not appear to me to have been contemplated by him.

I would observe, that, in supplying words on such occasions, we are not at liberty to form guesses or conjectures of what we would have intended in such a case, but to supply the omitted words, as necessary from the complexion of the whole will, as is said by Ld. Mansfield in *Watson vs Sheppard Dougl.* 28. On this view, I have formed my opinion.

As there was no son, but a daughter only, I disregard the clause for that event, as a supposed case which never happened; altho' there is no material difference, except that the devise to the son is upon condition, that he attain the age of twenty one, and that to the daughter, of her attaining that age, or being married.

The case of a son was mentioned, for the sake of observing, that if the limitation to the wife was upon the son's attaining 21, and he had died under age leaving issue, they would be disinherited, contrary no doubt to his apparent intention. In answer, that if that case had happened, from the plain intention to provide for the issue, I would have interpolated the words in the limitation to the wife, *if my son die under 21 without leaving issue*; confining it to the event at that period, and not extending it to a general failure of issue.

But however necessary this might be in the case of the son, it could not be so in the case of a daughter, who could not have issue before her marriage, which was a performance of the condition.

That the daughters attaining full age, 'or her marriage was a condition precedent to the vesting of any estate in her, appears to me evident; since although the cases shew, that the words *when* and *as* may be applied to the time of possession, and not to the vesting, I believe it never was, nor can be doubted, but that the word *if* must make such condition.

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Upon the will in the case before us, the condition applies to the whole; as well the remainder in tail after the death of the wife, as the moiety of the personal estate she was to have on marriage or coming of age, being coupled together by the word *and*. Thus making both to depend on the same condition, though to come into possession at different periods. So that the daughter on her coming of age, took a vested interest in half the personal estate in possession, and a vested remainder in tail in the real estate after the death of the wife. So far the reversion in fee is undisposed of; and, if the will had stopped there, would unquestionably have descended to the daughter. We come then to the enquiry whether that reversion is disposed of to the wife in the next clause. That a man may devise to A. for life, remainder to B. in tail, remainder to A in fee, is not questioned; but the true question is, whether this testator designed to make such a disposition?

That he intended his wife should have his whole estate, in case a child should be born, and die under age and unmarried, is apparent; for this might be beneficial to her whom he preferred to any other, having no collateral relations of his own: But that he looked forward to the remote possibility of a failure of issue, at any time after, is what I cannot discover a hint of, in this will; and therefore, although he might have made such a limitation, and if he had done so, the court could not have controuled it, the case is quite altered, when we are to supply words, supposed, from apparent intention, to have been omitted.

I can easily conceive that although he meant to provide for the case of his children dying in their infancy, when they could not make any disposition of their estates, yet when they came of age and had families of their own, they should take the estate in tail with the remainder in fee, subject to all the legal consequences of such an interest; that is to say, they could not alien in prejudice

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prejudice of their issue, unless by a legal mode the estate tail was defeated, but might do so if their issue failed.

As death is naturally opposed to life, there was great force in Mr. Call's observation, that the testator used the word *die* in opposition to *living*; that is, if the child die before the time I have required it should live to be entitled to my estate, then I give it to my wife.

My interpretation will make the two clauses consistent, but the other will produce inconsistency. For the half of the personal estate is given to the daughter absolutely, not to her and the heirs of her body; but the limitation over to the wife comprehends the whole personal estate with the lands, and if he meant the limitation to be on a general failure of issue, it would have contradicted the devise of the personal estate. If he had expressly so limited it, then it would have either been good as to the land, and void as to the personals, or good as to both by applying them to each in different meanings. But let it still be remembered, that we are supplying words for him, and should not make him contradict himself.

A question was asked, could the testator mean if his daughter died the day after marriage that his wife should not have the estate? I answer, he has fixed her marriage for vesting the estate in her, without hinting a difference in her interest, whether she lived a day or an hundred years. But I think I am warranted by the will, in saying, that if the testator had been asked, whether if his child had issue and that issue failed a thousand years after, the estate should go to the heirs of his wife, (the consequence of the limitation on a general failure of issue,) or to those claiming under his child or issue? He would have answered, that he cared nothing about it.

Upon the whole, the only supplement, which I think myself at liberty to make, will leave the clause

clause to read thus "Item, it is my further will  
 "and pleasure, that if the child, wherewith my  
 "wife now goes withal, die (if a male before he  
 "attains the age of twenty one or have issue, or  
 "if a female before she shall attain that age or be  
 "married,) then I give and bequeath to my said  
 "dear and loving wife Mary Achilly and her heirs;  
 "all my lands, houles, negroes, stocks, goods and  
 "chattels and debts due:" Making it an executo-  
 ry devise of the fee to the wife, upon the contin-  
 gency of the sons dying without issue under age,  
 or a daughter dying under age unmarried, which  
 I conscientiously believe was his intention.

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However as the other Judges are of a contrary  
 opinion, the judgment must be affirmed.

Judgment affirmed.

## LAWRASON

*against*

## DAVENPORT.

**D**AVENPORT and others brought a suit in  
 the High Court of Chancery against Lawra-  
 son administrator of Brown. The bill among  
 other things stated, that Brown, who was but lit-  
 tle indebted, died possessed of some personal pro-  
 perty, and entitled to compensation for his servi-  
 ces as an officer during the war; which was, after  
 his death, paid to the defendant Lawrason in cer-  
 tificates and warrants for the interest thereof, to  
 the amount of £ 1260 for certificates, and £ 581  
 1:4 in warrants; besides some military certifi-  
 cates issued to Brown himself. That Brown died  
 intestate, without children, leaving the wife of

Adm'r. fol-  
 ling a large  
 certificate to  
 pay a small  
 debt, not lia-  
 ble for what  
 the certificate  
 would have  
 sold for if kept  
 but for the  
 market price  
 at his own re-  
 fidence, at the  
 time of the sale

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Davenport and the other plaintiffs, Daniel, Charity and Robert Daugherty, his next of kin and legal representatives. That Brown was a native of Ireland as well as the plaintiffs who are ignorant of matters in Virginia; which was known to Brown, who has diſpoſed of the effects, certificates and warrants aforeſaid without ſufficient cauſe, and, except the pittance paid to the plaintiff Robert Daugherty, the whole remains in his hands. That when he ſold the £ 1260 in certificates, and the £ 581: 1: 4 in warrants, during the month of Auguſt 1791, there was no debt due from the eſtate, which rendered it proper, as public credit was then riſing. Therefore the bill prays for ſatisfaction, with an account of the adminiſtration, and for general relief.

The anſwer admits Brown's death, and that adminiſtration *de bonis non* has been granted to the plaintiff. States that the certificates for £ 1260 commutation, and the £ 581: 1: 4 intereſt thereon never came to the hands of the defendant, nor did he know that as adminiſtrator he was entitled to the ſame, until after the ſaid Robert Daugherty and a certain John Wiſe (who the defendant is informed is attorney in fact for the plaintiffs) had entered into an agreement concerning the commutation aforeſaid; and until Wiſe, under pretence that he knew of a debt due the eſtate in Richmond which he thought he could receive, procured a power of attorney from the defendant. That the defendant continued ſtill ignorant of it until after Wiſe had contracted for a ſale of the certificates with Finlay. When the power of attorney proving inſufficient and Wiſe and Finlay diſagreeing, Finlay informed the defendant of his title to the commutation certificate; but the defendant knows not the amount. That Finlay propoſed to give Robert Daugherty as much for the certificates, as he was to give Wiſe for them; and the defendant believing Wiſe knew the value of the certificates, as he had underſtood he had dealt conſiderably in certificates,

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agreed to the proposal, and gave a power of attorney; that the price received for them was £500, and the defendant believes that to have been as much as could have been gotten for them at the time. That the defendant had not sufficient effects in his hands to discharge a note given by Brown amounting with interest to £29:14:6. That the defendant thought himself more justifiable in giving the power as Robert Daugherty who was the only relation of Brown in America, and who claimed the whole, was desirous that the certificates should be disposed of. That the defendant knows of no debts due to the estate, except some partnership accounts, which are not likely to produce any thing.

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Three witnesses speak as to the relationship of the plaintiffs to the intestate. A fourth proves that he was concerned a moiety in the purchase of the certificates which he believes were worth about eleven shillings in the pound: Does not know when or for what price he sold them; that only four certificates issued for the £. 1260, they being all that were asked for; although it was probable that, if requested, more might have been obtained, as the Auditor was usually accommodating in dividing certificates into convenient sums.

A fifth witness proves what would have been the value of the certificates in September 1796, had they been funded by the defendant.

The Court of Chancery at the September term of 1796, being of opinion, that the disposition by the defendant of the military certificates and interest warrants, to which his intestate had been entitled, was not justifiable, the articles sold not being comprized, as that Court supposed, in the terms of the act of the general assembly, directing executors and administrators to sell such goods as are liable to perish, to be consumed, or to be the worse for keeping, and the sale not being necessary for payment of debts, nor having been

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made by public auction, decreed the defendant to pay to the plaintiffs 1887 dollars 55 cents; which would have been the then present value of the certificates and warrants aforesaid if they had been funded, with interest on 4320 dollars 46 cents from the 1st day of the preceding July; after deducting therefrom the £. 29 : 14 : 5 with interest from the first of December 1791.

From which decree the defendant appealed to this Court.

CALL for the appellant. Made three points: 1. Whether the plaintiffs had proved themselves entitled to the estate of the decedent? 2. Whether the payment to Wife the attorney of Daugherty, who was the only known relation of the decedent was not a discharge for so much? 3. Whether the administrator could be rendered liable for more than the certificate actually sold for. Upon the first he denied that the evidence was sufficient. Upon the second he insisted that the payment was good. Because the law would presume that there were no other relations, than those in this country, if the contrary was not shown; and therefore payment by the administrator to the only known relation here, and who was proved in a Court of Justice to be the decedent's heir at law, would be a sufficient exoneration; unless it could be proved that he knew there were other relations. For he was not bound to seek throughout all nations and countries for the kinsfolk of the deceased. Therefore as no knowledge of any other relation was proved at the time of the payment to Wife, that was a sufficient defence. Upon the third, he contended that he could not be made liable according to the case of *Graves vs Groves*, 1. Wash. and *Woodson vs Payne* in this court. \*

\* MARSHALL *contra*. The point relative to the title of the plaintiffs rests upon the proofs in the cause, which are conceived to be sufficient.

As

\* 7. Call's rep. 570.

Lawson,  
*vs*  
Davenport.

As to the second point made by Mr. Call, the law does not presume that there are no other relations, except what are in this country. There might be some pretext for such a presumption, perhaps in the case of a native; but there can be none in case of a foreigner. The administrator in this case had a reasonable ground to believe there were other relations; and therefore he ought to have inquired and informed himself. He ought either to have demanded security, or waited for a decree of a Court of Justice, before he proceeded to make any distribution. The payment therefore was premature and unjustifiable.

But if he be liable at all, it must be to the full value of the certificate; that is to say, the plaintiffs are entitled to the certificate itself or the value at the time of pronouncing the decree. The case of *Grates vs Groves* proves nothing to the contrary. For that was the case of a contract and decided on circumstances. At most, it only proves that the debtor could only be charged with the value of the certificates, which he had promised to deliver, upon the day on which they ought to have been delivered. But here the administrator was a trustee of the article, which he ought to deliver in specie or pay its value at the time of the decree. As to the case of *Woodson vs Payne*, I am not acquainted with it, and therefore am unable to make any remarks upon it. Upon the whole the administrator should not have sold more of the certificate than was necessary for payment of the £ 29; especially as it is proved he might have divided it; and therefore, having done otherwise, he is clearly liable for the full value at the time of the decree.

CALL in reply. If *Grates vs Groves* be laid aside altogether, yet that of *Woodson vs Payne* did completely decide this case. For the holder of the certificate there was a trustee as much as the administrator here. There the trustee having a right to apply a part disposed of the whole

Lawrason,  
*vs.*  
 Davenport.

whole; which was the case here; because the administrator had a right to sell for payment of the £ 29. If therefore the trustee in that case was not liable for more than the value at the time of sale, no more is the administrator here. Besides, if the administrator had actually known that the Auditor would have divided the certificate, there was no obligation on him to ask it. But there is no proof of any such knowledge; and it is far from being certain that the Auditor would have done so. For it does not follow, that because he would have accommodated Mr. Pollard, an acquaintance, in that way, that he would have extended the same kindness to every body, who asked it. For that might be attended with infinite trouble.

*Cur. adv. vult:*

PENDLETON President after stating the case delivered the resolution of the Court.

There is no question upon the liability of the administrator to pay the plaintiffs their due shares, though he paid the whole to Robert without notice; since that payment was at his peril and he might have secured himself, and perhaps did, by taking security for Robert to indemnify him.

The only question is, for what sum he shall be liable? whether for what the certificates were really sold for? or for the current market price of such at the time? or what they would be now worth, if they had been preserved, had been subscribed into the continental loan office, and had remained in that state? ●

The opinion of the court, with the reasons on which it is founded, will appear in the decree formed, and therefore are not anticipated.

“ The Court is of opinion, that the appellant  
 “ was liable to pay the appellees their distributive  
 “ shares of the intestates estate, notwithstanding  
 “ his having paid the whole to Robert Daugh-  
 “ erty without notice of there being other rela-  
 “ tions

" tions, since such payment was at his peril; and  
 " he either did take, or might have required a  
 " bond from Robert with security for his indem-  
 " nity. That the appellant is not liable for what  
 " the certificates, if preserved, would in event  
 " have produced now, by operations which he was  
 " not obliged, if he had power, to pursue, and  
 " which, if he had pursued, might in a contrary  
 " event of things, have reduced them to no-  
 " thing: He had not only power to sell the cer-  
 " tificates as an article which might grow worse,  
 " of which he, acting fairly, was the judge, but  
 " was compelled to do so, to raise as well the debt  
 " of twenty nine pounds fourteen shillings and  
 " five pence, as the distributive share of Robert  
 " Daugherty, a more considerable sum; but the  
 " administrator ought to be accountable for the  
 " value of the certificates at the time, according  
 " to the then market price at Alexandria where  
 " the intestate died, and where the administrator  
 " lived; as to which the answer is, that the  
 " administrator was induced to assent to the  
 " sale made by Robert Daugherty to Finley,  
 " from his opinion of the judgment of Wife,  
 " a considerable dealer in certificates, and who,  
 " when those in question were supposed to be  
 " his property, had agreed to sell them to  
 " Finley for the same price which the latter was  
 " to give Daugherty; and adds that he still be-  
 " lieves that they were sold for as much as could  
 " have been got for them at that time and place,  
 " tendering a fair issue for enquiry, whether the  
 " market price at that time and place exceeded  
 " the sales; to this the appellees have made no  
 " proof, the price at Richmond being foreign and  
 " unimportant, and the answer, being responsive  
 " to the bill, is uncontradicted; for which reason,  
 " and since the whole transaction appears to have  
 " been fair, without any view to benefit the ad-  
 " ministrator or purchaser, and had the approba-  
 " tion, or rather was the contract of Robert

Lawton,  
 vs  
 Davenport.

" Daugherty

Lawsaon,  
vs.  
Davenport.

" Daugherty the only relation then known to the  
" administrator, without deciding whether the  
" administrator should have sold the certificates at  
" auction upon due notice, or have equited them  
" ther of the current price than of wife.

" The Court is of opinion, under all the circum-  
" stances of this case, that the real sale ought to  
" stand as the market value, and the appellant to  
" account accordingly; and that the decree afore-  
" said is erroneous. Therefore it is decreed and  
" ordered that the same be reversed and annulled,  
" and that the appellees pay to the appellant his  
" costs by him expended in the prosecution of his  
" appeal aforesaid here, and the cause is remand-  
" ed to the said High Court of Chancery for an  
" account to be taken and a decree according to  
" the principles of this decree."

## JONES

against

## WILLIAMS

Ex'rs. who  
appear to have  
made no ad-  
vantage by it,  
will not be  
denied justice  
for having fail-  
ed to make up  
an account of  
their admini-  
stration, tho'  
strictly speak-  
ing it is per-  
haps their du-  
ty.

THIS was an appeal from a decree of the  
High Court of Chancery in a cause removed  
thither from the County Court of Nottoway, by  
writ of *certiorari*. The bill states that William  
Watson made his will and appointed several exe-  
cutors; but that Edward Jones was the acting  
executor. Who dying, Richard Jones became  
the acting executor. That Watson left four  
daughters to whom he devised a tract of 2650  
acres of land. That Thomas Williams the de-  
fendant intermarried with Elizabeth one of the  
said

Commissions disallowed an executor where a legacy is given him.

Quitrents allowed against the representatives of a surviving  
jointenant under the circumstances.

Jones,  
 or  
 William.

said daughters, and received the whole of his wives proportion of the said Watson's estate, except of the cash supposed to be in the hands of the said Richard Jones, which was unsettled. That in the year 1764 the said Richard Jones paid the defendant £ 77 : 15, through the hands of Neil Buchanan. That afterwards the defendant requested £ 100, but was told he had no title to it, whereupon he proposed that it should be lent him, and that he would refund it, if on settlement it should appear that he had no title. That the loan took place accordingly, and a bond for the money was given in conformity thereto, which with other papers has been lost. That the said Richard Jones is since dead, and the plaintiffs are his executors. That since his death, an order of Amelia County Court was made by consent of the legatees of the said William Watson and the plaintiffs for settling the accounts of the administration. That the commissioners made a report, whereby it appears that Watson's estate is indebted to the estate of the said Richard Jones. That according to that report, the defendant will be found to owe £ 30 : 4 : 4 exclusive of the £ 100; which he refuses to pay. Therefore the bill prays a decree for payment and general relief.

The answer admits that the defendant has received all his proportion of Watsons estate except the unsettled account; denies the charges of the bill relative to the £ 77 : 15; and says that the defendant has a fair copy of all his dealings with Neil Buchanan, and there is no credit therein for the same; admits that the defendant received the £ 100, for which he gave a receipt, as for part of his wives portion; but denies that he gave any bond to refund; although he told the said Richard Jones, if he had received more than his proportion, that he would refund; states that he had often requested the said Richard Jones to come to a settlement, as he believed there was a balance due him: That the said Richard Jones lent Erskine, who married one of the daughters of Watson about

£ 200,

Jones,  
vs  
Williams.

£ 200, which he afterwards told the defendant he was afraid would be lost, and asked him what he had best do, with respect thereto; That the defendant told Jones there would be some small estate of Erskine's after paying a mortgage to Speirs & Co. but Jones said he was unwilling to distress Mrs. Erskine; admits the order of Amelia Court, but says that the defendant was not present at the settlement, and calls on the plaintiff to support his allegations by legal evidence.

The evidence as to the £ 77:15 was chiefly circumstantial, and there was a variety of evidence as to the other parts of the case. The commissioner debited the defendant with a proportion of the quitrents, and disallowed the £ 77:15.

The defendant objected to the quitrents, but the Court of Chancery allowed them; and approved of the commissioners disallowance of the £ 77:15.

The plaintiff appealed from the decree of the Court of Chancery to this court.

PENDLETON President, delivered the resolution of the court.

This is truly stated to be a stale transaction, commencing in 1752; It was the administration of a small estate which was devised in 1765, and yet no account is settled by the executors till after all their deaths in 1786, when a partial one is made up by the executors of the survivor.

This had a bad aspect respecting the executors; but since no fraud or misconduct is imputed to them in the management of the estate, nor any apparent advantage, which they could, or did derive to themselves from the omission, but on the contrary a probable disadvantage, in having articles disallowed for defect in the proof, which they might have justified at an earlier period, we inclined to attribute it to inattention in them,

and

and confidence on the part of the legatee in their integrity, rather than to any impure motives, and therefore think it would be too severe to deny them justice on account of that omission of a duty; for such perhaps it is, although the law only directs them to render accounts when desired.

Jones,  
vs  
Williams.

When the children came of age, they might make private adjustments of the accounts with the executors, to their satisfaction, without reducing them to form. This appears to have been the case as to Edward Jones the principal acting executor, from 1752 to 1758, who never made up any account with the court, yet, till before the Auditor's in 1796, we hear of no complaint on that head; on the contrary, the defendant acknowledges that he received all his wife's part of the estate, except any money which might appear to be in the hands of Richard Jones.

With these impressions, the court proceeded to examine the justice of the case, and think the decree right as to the two articles discussed in court, disallowing the £77:15, as not sufficiently proved, though probably just and allowing the items for the quitrents.

Mr. Wickham was right in his position that joint obligations survive as well as joint rights, but it does not apply; since here was no existing obligation, when the survivorship took place.

The testator provided a fund in the hands of his executors to pay these quitrents, which they yearly applied accordingly, and are allowed those payments as a set off against that fund; to the surplus, to one fourth of which, the defendant was entitled.

We then considered the claim of the executors for commissions and interest on his balance.

The commissions are disallowed, because a reward is devised to the executors by the will.

But



Jones  
vs  
Williams.

But interest is allowed, because it is natural justice that he who has the use of another's money should pay interest for it.

It was objected that the executor had the use of the money previous to 1774 without accounting for interest; a just objection, if true. We examined the account from 1759, when Richard's administration commenced, to 1762, when Williams married; the balance then in Richard's hands was £ 125; 14: 10; he paid £ 83: 15: 3, and from that time the estate was in his debt to 1774. It is true the disallowance of articles now turns that balance against him, so as to reduce the £ 100 advanced in 1774 to £ 53: 13: 4, on that balance as an agreed loan, the plaintiff ought to have interest. There is therefore error in not allowing that interest. And the decree must be reversed with costs. And a decree entered for £ 53, and interest from July 29th 1774, and the other reservations in the decree.

## COUPLAND

against

## ANDERSON.

If there be a reference by rule of court in a suit depending to 4 arbitrators, or any three, and afterwards 2 others are added; if two of the first named arbitrators & one of the last make an award it is sufficient and a majority of the whole is not required

**THIS** was a writ of *superedeas* to a judgment of the District Court of Prince Edward. The petition stated, that Anderson instituted one suit against the petitioner, and the petitioner two against Anderson in the County Court. That all three

In such a case if the rule mentions that the money awarded is to be paid to the sheriff for the benefit of the plaintiff's creditors; the subsequent proceedings must be in that stile also.

If the plaintiff be bail for the defendant at the time of reference in a depending suit, the failure of the arbitrators to award concerning that undertaking will not vitiate the award.

The court may give costs, tho' the award does not mention them.

three were by rule of court referred to four arbitrators, or any three of them; and that the money awarded to the said Anderson, if any, was to be paid to the sheriff, for the benefit of his creditors. That, at a subsequent court, two other referees were added to the former. That an award was afterwards made by three of the referees, that is to say, two of those first appointed, and one of those who were last appointed, whereby it was awarded that the petitioner was justly indebted to the said Anderson in the sum of £ 205: 19 8, exclusive of a claim that the said Anderson had against the petitioner as common bail to Gadberry. That the County Court gave judgment for Anderson, according to this award, with costs. That the petitioner appealed to the District Court, where the judgment was affirmed. That an execution issued, on the district court judgment; and the petitioner gave a forthcoming bond, which he forfeited; and judgment has been entered on it against him. That these proceedings were erroneous. 1. Because the award was not legally made, or in pursuance of the authority given the said arbitrators; it being made up by only two of the first named arbitrators and one of those last named. 2. Because the award was not final; as it appeared there was a matter in controversy between the parties, which was not settled by the said arbitrators. 3. Because the court in rendering judgment gave costs, although none were awarded by the arbitrators. 4. Because the execution and all subsequent proceedings were in the name of George Anderson, without mentioning the sheriff, to whom the money was to be paid for the benefit of the creditors, according to the order of reference.

Coupland,  
vs.  
Anderson.

The award after reciting the suits &c. proceeds thus " We are of opinion, and do award accordingly, that the said Coupland is justly indebted to the said Anderson in the sum of two hundred and five pounds, nineteen shillings and eight pence; which will more fully appear by reference  
" ring

Coupland,  
M.  
Anderson,

"ring to the above statement of their accounts,  
"exclusive of a claim that Anderson has against  
"Coupland, as common bail for William Gad-  
"berry, now pending in the District Court of  
"Prince-Edward. Given under our hands, &c."

The entry of the judgment of the County Court upon the award is as follows. "In consideration  
"whereof it is the opinion of the court, that the  
"plaintiff recover against the defendant the afore-  
"said sum of two hundred and five pounds nine-  
"teen shillings and eight pence, *and his costs* by  
"him in this behalf expended; to be paid to the  
"sheriff, for the benefit of George Anderson's  
"creditors, so far as just claims against the plain-  
"tiff may appear: To which opinion of the court  
"the defendant by his attorney objected, because  
"the submission of the three suits aforesaid are  
"made in one award and blended together, when  
"they ought to have appeared distinct and sepa-  
"rate; and because the suit brought against the  
"defendant, in the name of George Anderson is  
"improper, he having become an insolvent debtor  
"before the commencement of the action."

The execution is, that the sheriff should make of Coupland's goods and chattles £ 205: 19: 8.  
"Which George Anderson recovered against him."

The forthcoming bond is payable to George Anderson; and the judgment, on it, is rendered in favour of George Anderson, without mentioning his creditors.

WICKHAM for the plaintiff. Objected 1. That by the first order of reference four referees were appointed; and then it was agreed that any three might make an award. But a two others were afterwards added, this altered that agreement; and therefore from that time three were not enough. For it is apparent that it was the intention of the parties that a majority should decide.

2. The

Compland;  
 vs  
 Anderson.

2. The submission was of all matters in dispute between the parties; but the referees have not included the claim concerning the responsibility in bail.

3. The referees did not award costs, and yet the court has given them.

4. The execution and subsequent proceedings are in the name of George Anderson only.

**RANDOLPH contra:** Awards are construed more liberally than formerly. The addition of the other two did not alter the first consent that three might decide. That consent is not taken away by express words, and there is nothing which implies it. On the contrary the last order refers to the first; and the agreement there extends to both. For the last order is but a component part of the first.

As to the case of the bail, it never was contemplated by the parties that the submission should extend to that. For that claim was too contingent and uncertain, whether any liability would attach or not. *Kyd. aw. 91*, has an excellent general rule on subjects of this kind; and proves the impropriety of extending submissions beyond the intention of the parties. The defendant has shewn his own idea on this point; for, when the award was presented into Court no exception was taken upon that ground.

As to the costs, if wrongly given, no supersedeas or appeal will be sustained on that ground merely. But the court had power to give them.

For originally the arbitrators could not; and their authority to award them was at last founded on the permission for that purpose given by the rule of Court, *Kyd 100*. But the court always had a right to grant costs; and plaintiffs were entitled to them at common law.

That the execution and subsequent proceedings were in the name of George Anderson without mentioning

Coupland,  
vs.  
Anderson.

mentioning the sheriff to whom the money was to be paid, is no objection. For the words of the judgment are that they shall be paid to the sheriff, which controuls the subsequent proceedings.

*Per: Cur.*

"The Court is of opinion that the said judgment is erroneous in this, that it was omitted to be entered therein, that the money was to be paid to the sheriff for the benefit of the creditors of the defendant, so far as just claims against him might appear. Therefore it is considered that the same be reversed &c. and this Court proceeding to give such judgment as the said District Court ought to have given. It is further considered that the defendant recover against the plaintiff four hundred and fifty seven pounds five shillings and eight pence, the penalty of the forthcoming bond in the proceedings mentioned, and his costs in the said District Court expended, to be paid to the sheriff for the benefit of the creditors of the defendant, so far as just claims against him may appear; But to be discharged by the payment of £ 228: 12: 10 with interest thereon to be computed after the rate of five per centum per annum from the 16th day of April 1796 till payment and the costs."

### PRICE, &c. vs. CAMPBELL.

In order to constitute usury, both parties must be consenting to the unlawful interest: that is to say, the lender to ask, and the borrower to give.

Therefore if a bill of exchange is

**T**HIS was an appeal from a decree from the High Court of Chancery, where Campbell as assignee of his father Robert Campbell, brought a bill stating, that the said Robert Campbell purchased divers bills of exchange drawn by Carter Braxton on sundry persons in Britain, payable to the said Robert

drawn upon an obscure man in Scotland, altho' the payee may expect it will be protested, yet if there was no agreement between him and the drawee, that it should be protested, the transaction is not usurious.

There must be proof of a lending and borrowing to constitute usury.

Price  
2s.  
Campbell.

Robert Campbell, to wit, one for £ 200 sterling drawn on . . . . . One drawn on Edward Harford for £ 200 sterling; another on Robert Young for £ 1811 : 3 : 11 sterling; another on Robert Cary and Company for £ 400 sterling, amounting in the whole to £ 2612 : 3 : 11 sterling, and as great part of Campbell's fortune, who was about to return to Great Britain, depended upon payment of the bills, and that drawn on Young was for so large a sum that a failure would have been ruinous, it was stipulated that the amount of it in case of protest should be ultimately secured in Virginia. That in pursuance of that stipulation, a deed was given by Braxton to the said Robert Campbell, for a tract of land called Broadneck and another called Fosters with sundry slaves, with proviso that if the bill for £ 1811 : 3 : 11 should be protested, and Braxton should afterwards pay the amount, with interest, that the deed should be void. That the bill on Cary & Co. for £ 400, and that on Young for £ 1811 : 3 : 11 were protested for non payment; of which Braxton had notice. That he made some payments towards the same, reducing the balance to £ 1969 0 : 3 sterling as appears by an account made up, by two persons for that purpose chosen, who have subscribed their names to their award or report thereon. That the said Robert Campbell afterwards being dissatisfied with the security and requiring other, Aylett and Brooke entered into an obligation in writing, as securities for whatever sum Braxton might then owe Campbell; That this obligation was by some accident destroyed, and that Aylett and Brooke, being informed thereof, afterwards gave a writing acknowledging the former, and obliging themselves anew. That for reasons unknown to the plaintiff, Robert Page afterwards placed himself in Aylett's stead, by an indorsement on the said last named writing. That, the securities afterwards growing uneasy, Braxton, for discharging the debt and indemnifying the securities, gave a deed to Drury Ragf,

dale

Price  
of  
Campbell

dale and George Braxton for a tract of land in Halifax, two lots at West Point, and sixty slaves, in trust to sell the same if necessary, for satisfying that and other debts and indemnifying the creditors aforesaid. That Braxton for further securing Page, and for securing White, who was his security in a debt due Govan, gave another deed to Page and White for 76 negroes and other property, in trust to sell them, if necessary, for their indemnity. The bill therefore prays relief against Price, executor of Brooke, George Braxton, Drury Bagdall, Carter Braxton, the administrator of White, and the other creditors stated in the first of the above mentioned deeds of indemnity; and that the lands slaves and property in the said trust deeds contained, might (except the lands released by Robert Campbell) be sold for satisfaction of the plaintiffs claim.

The answer of Braxton states, that Robert Campbell then of Virginia was possessed of two bonds the one for £ 1335 sterling, the other for £ 1200, liable to a deduction of £ 61. That the first he was not likely to receive for a long time, and the second was not to be paid till the estate of the obligor could raise it. That the defendant negotiated for those bonds, and purchased them, without recourse on Campbell. That this purchase was the only consideration for the bills. That Robert Campbell demanded interest at the rate of 10 per cent upon the loan of the two debts, and took the bills of exchange to legalize the transaction, if he could. That Young the drawee of the bill for £ 1811:3:11, was a friend and relation of Campbell's in Scotland; a Clergyman, not engaged in commercial business, and unknown to the defendant, who had never heard of him before; that the defendant does not recollect when he received notice of the protests. That Campbell not content with the mortgage, made the defendant give the personal security mentioned in the bill: Upon which he engaged to relinquish the mortgaged premises. After which the defendant sold the mortgaged

aged lands and most of the slaves, That Campbell in July 1777 wrote a letter in which he declares the defendant is to pay 6 per cent interest, from the expiration of the deed to that time; but notwithstanding this, he afterwards stated his account at 10 per cent, That the settled account stated in the bill was not intended to be conclusive, but was done merely to ascertain the payments made by the defendant. Insists that the contract is usurious; and claims the benefit of the act of limitations.

Price  
vs  
Campbell,  


The answer of Price. Insists on the usury; and claims the benefit of the act of limitations: Prays, that if his testator should be considered as liable, the mortgaged property may be first applied.

The commissioner reported £ 2498 : 1 : 2½ currency, sterling to be due in March 1784; of which £ 1547 : 17 : 6 to carry 10 per cent interest until paid.

The suit abated as to Page, and was revived against his administrators. Who insist on the usury and act of limitations, and suggest the uncertainty of assets.

The answer of George Braxton, says he never was in possession of the trust property,

The deposition of a witness says, that he heard Robert Campbell say he had lent Braxton a large sum of money, but does not know whether it was in bonds or money; thinks as well as he can recollect, that he has heard the said Robert Campbell say the debt due him from Braxton was in bills of exchange, but does not know it was for the sake of obtaining 10 per cent interest; altho' that was a mode, much practised in those days, of obtaining ten per cent interest. That he knows Broadneck and some slaves were mortgaged to Campbell; and believes it was on account of the said loan. Has understood that Campbell released part of the mortgaged premises, and took person.



Price  
vs  
Campbell.

of security. Being interrogated, says that he is not positive, whether the debt was contracted by loan or otherwise.

A second witness says, that he understood Campbell had let Braxton have the bonds, and that bills of exchange were given; but knows not the terms as to either. That he understood a plantation was mortgaged to secure the debt. That Campbell soon after went to Scotland.

Two other depositions speak of taking slaves in execution; and the sales being forbid by White and Page.

There are among the papers the several exhibits spoken of in the bill and answer, to wit, the mortgage, the two deeds of indemnity, the second obligation of Aylett and Brooke, with Page's indorsement. Campbell's settled account, spoken of in the bill, charged Braxton with the two bonds, and credited the bills of exchange; but debited him anew with the bills and credited the payments, leaving the alledged balance of £ 1960 0:3. In this settlement the amount of the bonds at the time of the transaction is made to be £ 2551:2:11. And the amount of the bills of exchange is made to be £ 2611:3:11; which makes a difference of £ 60:1. And this the referees credit as a balance due to Braxton at the time of giving the bills; and the commissioner in his report charges it thus, "To balance overpaid at this date £ 60:1." There are several letters in the record between Braxton and Campbell, on the subject of payment; and particularly that spoken of in Braxton's answer. Which appears to have been written after November 1778 instead of July 1777 as Braxton's answer supposes. Wherein after some remarks on the subject of a tender by Aylett, Campbell adds "to put an end to the most troublesome affair ever man was concerned with, I now inform you that if you will bring the money to New Castle or to Hanover town the day of Mr. Jones's sale, will receive it, you paying

ing the six per cent from the expiration of the deed, the above is a just and true state of the affair between you and your humble servant."

Price  
vs.  
Campbell.

There is another letter nearly, in the same words, not directed to any person or dated; to which there is a postscript in these words "Instead of bringing or sending the money you sent Mr. Clark for my answer, which was, that as you had not complied in bringing or sending the money to the time, but desired I might call or send some person in my stead for it, I was now of another opinion, for that as I intended home first opportunity, in that case this currency could be of no use to me, but would take it in different payments, two, three or four years hence—interest, to which no answer."

In a letter from Campbell to Braxton dated in July, 67, which was prior to the assignment of the bonds, in July 1768, Campbell says, "Being obliged to separate my bonds, thought myself under an obligation in consequence of what had passed between us on that subject, to reserve one until your return; and shall want to know by the bearer if I am to dispose of it or not."

In another of the 6th, of August 67 he says, "I suppose you know by this time that it is Major Gaines' bond, I have it still by me."

In another of the 29th, October 67, he says, "I shall send down, by Mr. Sample, Major Gaines' bond, and if you can get the late speaker's administrators in the humor to discount I am willing to transfer the same, though am well satisfied that money cannot be better secured."

In another of the 17th, of February 68, addressed to Carter Braxton Esq, Williamsburg he says, "I received yours last night, which shall fully answer in a few days, probably call on you to have the affairs finished one way or other, I do not

" want

**Prite  
vs.  
Campbell.**

"want any advance so much as the money, and  
"that in good bills, or could have disposed of the  
"bonds without asking consent of any person be-  
"fore this time.

“Should you hear of my purchasing Bofs’s land which I hope will go no further, until that affair is over and the old informer cast up, it shall in no ways affect your bargain, as to the gentleman not making himself liable to me on your account, I knew that some time ago, but there are many I should prefer to him on sundry accounts, the exchange falling will certainly be an advantage to you, and whether my notions maybe chimerically founded or not, time only can tell, though I think and wish should we agree that you may come off with paying 2½ per cent instead of                    I have had no account from your quarter for a long time, nor can I tell whether London is in being or not. I am Sir, your humble servant

ROBERT CAMPELL.

February 7, 68,

"You may depend on the affair transpiring from."

R. C."

The Court of Chancery decreed payment of £2498 1: 2 currency with interest at the rate of 10 per cent to the time of pronouncing the decree, and five per cent interest on both from the time of the decree until payment, and in default thereof, that the mortgaged slaves should be sold for satisfaction, and if they should prove insufficient, that that the administrator of Brooke and the executors of Page should out of the estates of their decedents pay the balance. And dismissed the bill without costs, as to the other defendants. From which decree Braxton and the other defendants against whom the decree for payment was made, appealed to this Court.

WARDEN and MARSHALL for the appellants,  
contended, i. That

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1. That the contract was usurious. For the real substance of the agreement was a loan, and the bills were but a mere device to take the case out of the statute. Every circumstance shews that it was clearly understood betwixt the parties that the bills would come back protested. That on Young was not drawn on a merchant of character, trading to America, and therefore likely to have funds in his hands to answer it; but upon an obscure clergyman, not even inhabiting in a trading town, but residing in the interior of Scotland; and not shewn to have had any connection whatever with Braxton. The bills were given for bonds at par. The mortgage is for the payment of the money by installments, which would not have been the case if it had been a purchase instead of a loan: Neither would it have been the case in a security for a bill expected to be paid; but it was very likely to be done in the case of a bill which it was supposed would not be paid.

2. That Campbell's claim was barred by the statute of limitations: For Braxton's letters were not written within five years; and Page's engagement was not under seal.

3. That the debt at most ought only to carry simple interest. For the bill was merged in the mortgage; and if a suit was brought at law, upon the covenants, a jury would only give five per cent. The securities were bound for a sum certain, and not as Indorsers of the bills; on which no action can be maintained against them.

RANDOLPH & WICKHAM *contra*.—Contended that the contract was not usurious. That there was nothing which shewed Campbell's knowledge that the bills would be protested when he took them; and although privately there might have been such an expectation in the parties, these circumstances will not affect the case, unless it was part of the agreement that there were no funds in the drawees hands, and that the bills should be protested. That the person on whom they were  
were

Prize  
of  
Campbell.

were drawn afforded no knowledge of any such agreement; because Braxton might have money in his hands to answer the demand, by remitting in time, or by various other means. So that it was contingent whether they would be protested or not, and Braxton had it in his power to avoid the ten per cent; which took it out of the statute. That it did not appear that he affected to assert that the contract was for a lending and usurious, until long after the transaction. That the mortgage was taken merely in the room of an Indorser, which was the customary mode; and therefore no unfavorable inference could be drawn from that circumstance. That the act of limitations did not apply, as the deed of trust protected the claim. That the deed being a collateral security for the money due on the bills, it was the bills themselves which were to ascertain the amount due to the creditor; and as they bore ten per cent. interest, that rate of interest was to be paid out of the trust property.

*Cur. adv. vult:*

ROANE Judge. This case viewed in its proper light, is really a very short one, and as I think a very plain one. It has but two real questions in it. 1. Whether the contract was usurious? 2. Whether the claim is barred by the statute of limitations?

In order to simplify the case, I may throw out of it some points which are too plain for discussion. As first whether the mortgage extinguished the bill of exchange? 2. whether the securities Brooke and Aylett became bound, by their agreement, to pay 10 per cent interest, in the event of the bills being or having been protested? As to the first, it is clear that the mortgage recognized the bill of exchange, as an existing one; and so far from extinguishing it, creates an additional security for its payment. The bill of exchange therefore, and not the mortgage, is the contract which

determines

determines the rate of interest to be paid, and is the contract really sued upon. As to the second, the general agreement of the parties will extend as well to the nature as to the amount of the debt due from Braxton to Campbell; and the nature of the debt due by bill of exchange, determines the rate of interest to be paid by them on protest to be 10 per cent per annum.

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The question of usury is rather more difficult; but I think nevertheless sufficiently clear. I admit that, on questions of this kind we are at liberty to infer usury from the circumstances of the transaction itself. Otherwise it would be generally impossible to detect it. But in making this inference, we are confined to the enquiry, whether there is a corrupt contract or agreement for usurious interest? Now such a contract or agreement presupposes the consent of both borrower and lender to this effect; and without it there is no usurious contract; whatever may be the hopes, wishes, or expectations of either party. Thinking this principle to be almost self evident, I shall proceed to examine the present question by it.

The contract, by which Braxton transferred a right to money in Scotland to Campbell, for a valuable consideration, as evidenced by the bill of exchange, was a lawful contract; and it had the concurrence of both parties thereto. It is no objection, to the legality of such contract, that the drawee is a stranger to the drawer; that the latter has no funds in the hands of the former; or that the drawee is in a line of life other than commercial. This contract is for the payment of money in another country (not in this;) and for the injury arising from a disappointment, the law has allowed an interest of 10 per cent per annum; and so far operates as an exception to the general act of usury.

This contract is to be considered as the real contract between the parties, unless it be subsequently

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quently changed, or it has been previously agreed that the bill is not to be paid, but to be protested, and the money paid here. In the last case the bill would be considered as a shift to evade the statute of usury, and conceal the real agreement of the parties.

However strong the answer of Braxton is to shew an usurious tendency and disposition in Doctor Campbell, as evidenced by the unusual circumstance of his procuring Braxton to draw on a stranger, a clergyman, and a person having no funds of the drawer; Yet he does not state any consent on his part to waive his right to consider this as a legal bill and to procure it to be honored. He does not state any agreement on his part, subsequent to the drawing of the bill, that it should not be paid; or any previous agreement that the money was really to be paid here, and consequently, that the bill is a mere shift to evade the statute.

The question then is reduced to this short point. There is a complete agreement of both parties evidenced by the bill of exchange, that the money should be paid in Scotland. There is a hope, an expectation, and even a contrivance in the party, and probably an expectation in both, that the money should not be paid in that country, but in this; but there is no agreement, carrying this expectation into effect, barring the right of Braxton to consider the contract as a real bill of exchange and to procure a payment in Scotland, and converting the contract into an usurious one.

With respect to the plea of the act of limitations, there is no doubt, that laying out of the case the previous acknowledgments, but the deed of Braxton to Page and White is an acknowledgment which will prevent its operation. That deed refers to the debt to Campbell as an existing one; and when it speaks of £ 2000, it is only as being the amount of it as supposed by Campbell's representatives; and the license of Page and

White

White of the 14th of April 1793 to the sheriff to sell some of the negroes, recognizes and refers to that mortgage. I think therefore the decree ought to be affirmed.

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Campbell.

But Mr. Randolph asks to correct it. 1. In decreeing that the slaves sold to Adams by Page's consent should be accounted for. And 2, that liberty should be reserved to the appellee to proceed against the distributees of Brooke's property.

As to the first, I answer that such of Brooke's slaves mortgaged to Page and White, as were comprehended in the deed of mortgage from Brook to Campbell, are now liable to Campbell, by the decree into whose hands soever they may have come, and that Campbell has no lien upon the slaves not so comprehended, but the lien as to them was only in favour of Page and White, who have released it.

And as to the second, that the distributees of Brook having given or being liable to give bond to the executor to refund, are completely entitled to their distributory shares exempt from any claim, except such as is supported by a specific lien on such property, which in this case is not I believe pretended.

**FLEMING Judge.** The counsel for the appellant made three points in this case. 1. They contended that the contract was usurious, and therefore void. 2. That the act of limitations applied in favour of the securities. 3. That the nature of the debt was altered, by security being given; from which time the contract was changed, and carried only 5 per cent interest.

As to the first, I observe, that in order to constitute usury, there must be a borrowing and a lending, with an intent to exact exorbitant interest beyond what is allowed by law, or a forbearance in consideration of such interest being paid. But here appears no conclusive evidence that such

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was the case in the contract now under consideration. There are indeed several suspicious circumstances respecting the bill drawn on Young; but it is unnecessary to repeat them, as they are not sufficient, in my mind, to bring the case within the statute of usury.

As to the point of the act of limitations, I think the undertaking of the securities in December 1775 under seal, excludes them from the benefit of that act; and that Page's undertaking to stand in the place of Aylett and to perform every engagement of his (although not under seal) bound him to abide by every consequence, which was to follow from Aylett's suretyship. In addition to this, Page afterwards accepted a deed of trust from Braxton as an indemnity: Which, with the other circumstances just mentioned, certainly removes all pretence for the plea.

With respect to the third point, that the taking of the mortgage for security of the debt, changed the nature of the contract, and made the debt bear five per cent interest only, it is sufficient to observe, that the consideration of the mortgage expressly is, to secure the repayment of the money paid by the mortgagee for a set of bills of exchange therein described, if they should be protested; which in that case would by law carry an interest of 10 per cent per annum. So that Campbell's accepting the mortgage did not change the nature of the debt, but was considered merely as an auxiliary security for the payment.

Mr. Randolph thought there was error in the decree in not allowing the appellee to proceed against the legatees of Mr. Brooke for the slaves in their possession, and to pursue the mortgaged slaves purchased by Adams. But, besides the answer already given to these objections, it is sufficient to observe that those parties are not before the court, and consequently, we can make no decision affecting them. I am therefore for affirming the decree altogether. Carrington

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**CARRINGTON Judge.** Three exceptions have been taken to the decree of the Court of Chancery in this cause. 1. That the contract was usurious and void. 2. That the plaintiffs claim was barred by the statute of limitations. 3. That the 10 per cent ceased on taking the mortgage, and that only five per cent could be demanded after that period.

As to the first, it is said that the contract is usurious, and therefore void. But to constitute *usury* there must be a loan or forbearance; and there are no features of either discoverable in this cause. Braxton, in his answer, calls the transaction a sale and purchase of two bonds for which the bills in question were drawn; and although he afterwards speaks of them as a loan, yet from the nature of the thing in question (namely bonds) they could not have been intended to be returned: Because in that case they would have been of no use to the borrower; who contracted for them for the purpose of negotiating them in payment of his debts to others; and they were certainly drawn as a consideration for the purchase. As to the shift which has been alledged, it is possible that the intention of Campbell was to make greater profit than five per cent, but such intention is not proved. Braxton indeed states it in his answer; but the answer is not responsive to the bill, and is unsupported by testimony. Besides altho' Braxton states that to have been Campbell's intention, he does not say that he himself consented to it, which was necessary to form the contract between them. In short I discover no trace in the transaction so conclusive as to justify me in criminating Campbell and depriving his representatives of their debt. For there is nothing in the case out of the usual course of that kind of business; which was thus, the debtor drew bills of exchange payable to his creditor, but in case of the possibility of non acceptance an indorser was generally required. In the present case however, in lieu of an indorser, Braxton conveyed an estate

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as a security for the large bill on Young. In this view it was a fair transaction, and not justly liable to any objection. But added to this, Braxton's defence is materially weakened by his lying quiet so long, and making considerable payments, without any complaint.

Upon the whole, I consider the case as not coming within the statute of usury; and that the security taken was intended to strengthen and not to injure the plaintiffs legal rights under the bills of exchange.

The second exception was that the claim is barred by the act of limitations. But there is no ground for the objection; because the claim has been preserved, from the operation of that act, by various transactions down to the year 1792, when the suit was brought.

The third exception, taken by the appellants counsel, has been already anticipated; and I shall only add that I think there is no weight in it.

As to the corrections asked for by the appellees counsel, it is sufficient to observe that Brooke's representatives are not before the court, and therefore we can make no decree against them.

Upon the whole, I concur in opinion with the other Judges, that the decree was pronounced on just principles and ought to be affirmed.

EPPE\$

EPPE &amp; AL. ex'rs of WAYLES

against

RANDOLPH.

**T**HIS was an appeal from a decree of the High Court of Chancery, in a suit where- in the executors of Wayles were plaintiffs against David Meade Randolph, Richard Randolph, Ryland Randolph and Brett Randolph sons and devisees of Richard Randolph, deceased; the bill stated, that in December 1772 the said Richard Randolph, deceased, being indebted to Bevins in £ 740 sterling, executed his bond binding himself, his heirs &c. for payment of the same; that Wayles was security to this bond, That Bevins going out of this state left the bond with Wayles, who died in possession of it; no part thereof having been paid; that Bevins brought suit and obtained a decree, in Chancery in the Federal Court, against Skipwith and his wife executrix of Wayles for the said £ 740 with interest; that the plaintiffs have paid off great part of the said decree, and are going on to discharge the residue. That the said Richard Randolph, deceased, by his will, after several devises, gave the residue of his estate, to his four sons above mentioned, whom he made executors: That he died largely indebted, and the executors alledge a want of assets to pay his creditors: That on the 11th of October 1780, the said Richard Randolph, deceased, being indebted on the bond aforesaid and otherwise to an amount equal to the whole of his estate, executed a deed for a tract of land in Bermuda Hundred, Chesterfield county, with the stocks thereon, and 19 slaves to his son David M. Randolph, *for and in consideration of his natural love and affection for his said son, and for his advancement in life;* that the said Richard Randolph, deceased, being indebted as aforesaid, did

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Deed re- acknowledged within 8 months, from its date, and recorded within 4 months from the reacknowledgment is good from the date of the reacknowledgment, altho' there are more than 8 months between the time when the deed was first executed and the day of recording it.—Although the deed does not mention, that it was made in consideration of a marriage contract, the party may aver and prove it.

Judgments do not bind lands after 12 months from the date unless execution be taken out within that time, or an entry of elegit be made on the record.

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vs.  
Randolph.

on the 20th day of September 1785 executed a deed for his estate called *Curles* to his son Richard Randolph, after the death of the said Richard Randolph, deceased, and Anne his wife, "The consideration, expressed in the said deed, being "a marriage shortly to be had and solemnized, "between the said Richard the son and Miss Maria Beverly the daughter of Robert Beverly;" but that the said Maria was not a party to the said deed. That the said deed was not recorded until the third day of July 1786: That the said Richard Randolph, deceased, was at the time of making his will and at his death seized in fee simple of two tracts of land in the counties of Cumberland and Prince Edward; one called Sandy Ford, the other Clover Forest, also of a mill and acres of land in Prince Edward, and of two other tracts of 130 acres each in Chesterfield county, one of which was called Elams. That he devised Sandy Ford to his son Brett, and Clover Forest, with one of the 130 acre tracts in Chesterfield, to his son Ryland; that he devised the mill and 50 acres of land adjoining it to his sons Brett and Ryland, and Elams to his son David M. Randolph. That the said Richard the son is heir at law to his father the said Richard Randolph deceased. That the said deeds were made, by the said Richard Randolph, deceased, when he well knew that his estate, in possession, was insufficient to pay his debts, and that the said deeds were made with a view to defraud his creditors: That they are void as to creditors not only for that reason, but because the conveyance to David M. Randolph was not made on consideration good in law against creditors, and that to Richard was not recorded in due time according to the act of Assembly. That, if there be no personal assets, the plaintiffs are entitled to satisfaction out of all the said lands, or any other real estate of the said Richard Randolph, deceased, as they have a right to stand in the place of Bevins, and of any other creditors by specialty,

who

who have been paid their debts, out of the assets in the hands of the executors; and that Richard the son has mortgaged Curles to Singleton and Heath: The bill therefore prays a discovery of the personal estate; and, if that should prove insufficient, that the plaintiffs may have satisfaction as well out of the said lands mentioned in the deeds, as out of those devised by the will; and for general relief.

Eppes &c.  
vs  
Randolph.

The answer of David Meade Randolph as acting executor says, that he knows nothing of his own knowledge relative to the bond: That the testator died greatly indebted by judgments, bills of exchange, bonds, notes and simple contracts to a greater amount than the assets which have come to his hands: That the assets will not be sufficient to pay the debts of higher dignity: He also demurs to that part of the bill which prays, that the plaintiffs may be put in the place of the bond creditors, because the plaintiffs by their own shewing are not bond, but simple contract creditors. In his own right he pleads that he took no lands or slaves by the devise, except the tract of 130 acres in the county of Chesterfield called Elams; which he did not take to his own use, but has sold it, and applied the money to the use of the testators estate: That, in the year 1780, the defendant, having made proposals of marriage to Mary the daughter of Thomas Mann Randolph, the latter wrote a letter to the said Richard Randolph the defendants father, consenting to the marriage, provided the said Richard would give the defendant a decent and competent fortune, and put him in possession of it; that this letter was delivered open to this defendant, to be presented to his father the said Richard Randolph the elder; which the defendant did: That it has been since lost, but the contents can be proved: That, in consequence of the said letter and the intended marriage, the said Richard Randolph the elder, upon the 8th of August 1780, wrote a letter to the defendant, to be shewn to the

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*(underlined)*

the said Thomas M. Randolph, in which he promised, in consideration of the marriage taking place, to give the defendant a fee simple estate in all his Bermuda Hundred lands, and a tract of 1000 acres situate upon *Dry creek* in the county of Cumberland, with the slaves and stock thereon, and two negro carpenters. That the marriage afterwards took effect; but a little before the celebration thereof, to wit, on the 11th of October 1780, in consideration of the said intended marriage, the said Richard Randolph the elder conveyed to the defendant the Bermuda Hundred lands in Chesterfield with 19 slaves thereon; and as he had not the legal estate in him, he gave the defendant a letter of attorney to sue for and obtain a conveyance from the Royall's of whom the said Richard the elder had purchased it; by virtue of which letter of attorney the defendant obtained a decree for a conveyance against the heir of the Royall's; and a deed hath been accordingly executed to him. That the said Richard, in compliance with his letter aforesaid, conveyed to the defendant the Cumberland estate also. That, owing to a mistake in the attorney who drew the deed, the marriage is not expressed as the consideration; although it was the real consideration.

Richard Randolph in his own right pleads, that he took no lands or slaves by devise; and demurs to that part of the bill which prays that the plaintiffs may stand in the room of the bond creditors, as, by their own shewing, they are not bond creditors: By way of answer, he says that he knows nothing of Bevins bond of his own knowledge; and states the want of assets to pay debts of superior dignity.

The answer of Brett Randolph states, that he knows nothing of Bevins' debt mentioned in the bill; admits his father's will, but says that he never qualified as executor: It likewise admits the devise to him of Sandy Ford lands and a moiety

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ty of the mill. Of which he has sold        acres including a moiety of the mill, for the sum of £        : That the testator was indebted by bond to Pleasants in £        who has brought suit and obtained judgment thereon against him and the said Ryland as devisees as aforesaid; of which judgment the defendant is bound in law to satisfy a moiety: That the testator was likewise indebted by bond, to Benjamin Harrison jr. and company in £        ; who have also obtained judgment against him and the said Ryland as devisees; and have sued out execution against the whole of the residue of the devised lands unfold by the said Brett; that the said residue was naked and unimproved at the time of the testators death; but has been improved by the said Brett, which has increased its value; That, after the execution aforesaid issued, the defendant let the said Benjamin Harrison have the said residue, at a fair valuation, in discharge of part of the sum due by the said execution: That he was also obliged to purchase of Jackson (who had the fee simple therein) 371 acres of the Sandy Ford tract at £        ; which should be allowed, or the said 371 acres should not be considered as any part of the devise; That these sums, to wit, for Pleasants judgment, that for the improvements, and that for the purchase of Jackson's lands, are of greater amount than the alienations made by the defendant.

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The answer of Ryland Randolph is to the same effect with Bretts respecting the plaintiffs debt, the executorship, the devises to the defendant, the judgment of Pleasants, that of Harrison & Co. and the issuing of the execution by the latter; that the defendant sold the Chesterfield tract for £ 371 : 16, and 74 acres of Clover Forest for £ 76 : 15; That Harrison & Co. have taken the mill and all the lands unfold by the defendant in execution, which were not sufficient to pay the interest of the defendants proportion of that judgment, whereby Harrison & Co. obtained a perpetual

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Eppes, &c.  
vs  
Randolph.

tual title thereto; That the defendant, after the testators death, was obliged to pay an arrearage of taxes due on the testators several tracts of land in Cumberland; That the defendant had bought Brett's moiety of the mills, which was also included in the extent on the execution. Which together with the defendants moiety of Pleasants judgment exceeds the amount of his alienations.

The deed from Richard Randolph the father to Richard Randolph the son was dated on the twentieth day of September 1785; was re-acknowledged on the 21st of March 1786; and was recorded on the 3d of July 1786. The consideration is expressed to be, "for the purpose of advancing him the said Richard Randolph the younger, and for and in consideration of a marriage intended shortly to be had and solemnized between him and Miss Maria Beverley the eldest daughter of Robert Beverley of Blandfield, and also, for and in consideration of the sum of five pounds to the said Richard Randolph, by the said Richard Randolph the younger, in hand paid."

The deed from Richard Randolph the elder to his son David Meade Randolph for the Bermuda Hundred lands is dated on the 11th of October 1780; and the consideration is expressed to be, "the natural love and affection which he beareth to his son the said David Meade Randolph and for his better advancement in life." And that for the Dry Creek land in Cumberland, expresses to be made, "for and in consideration of the natural love and affection which the said Richard Randolph beareth unto his son the said David M. Randolph and for his advancement in life."

There is a letter from Richard Randolph the elder to his son David Meade Randolph in the following words.

"Dear Davy,

"Ever since you informed me, you had a prospect of forming a connection to very agreeable

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able to your friends here, I have exerted myself, to little purpose, to procure you a seat to carry a wife to, as it never was consonant to my notion of things, any man should think of marrying until he had a home (let it be ever so different) to present those with, that ought to be most dear to him: Which, I flatter myself, is the sole motive that induced you to engage in a business so serious; because you may be assured without such honorable intentions, there is little happiness to be expected from such a measure; and having not the least doubt of your plans being on the most noble principles, I shall think it a duty incumbent on me to enable you to carry them, without delay into execution: Which I shall do cheerfully, as I wish to live now, altogether for the sake of my children, having lost my relish for almost every thing else.

When I furnished your Uncle with twelve thousand pound for the reversion of Turkey Island, it was with a view of securing it for you; but as your present situation may make it inconvenient to you to wait for dead mens shoes, instead thereof I am very willing, in consequence of your marriage taking place with Col. T. M. Randolph's daughter Polly, to give you a fee simple estate; in all the lands I have in Bermuda Hundred, one thousand acres in Cumberland county, called and known by the name of Dry Creek, together with all the slaves and stocks thereon of every kind whatsoever, with two negro carpenters, mulatto Peter and Miingo; so that, should this proposal be agreeable to all concerned, I shall hold myself in readiness to ratify it any moment, and am with love to the good family, your loving father.

RICHARD RANDOLPH."

Curles, Aug. 8, 1780.

Curry a witness to the re-acknowledgment of the deed, states; That both Richard Randolph  
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the father and Richard Randolph the son re-acknowledged the deed from the former to the latter, when he attested it as a witness.

There are several depositions, proving the amount of the value and improvements put by Brett on Sandy Ford; the sales made by him; and the valuation at which the residue was taken by Harrison.

The deposition of Richard Randolph the son states, that in the year 1780, he heard his father read a letter from Thomas M. Randolph, which was said to be a *joint letter*, and requiring a settlement of property to a certain amount, previous to their consenting to the marriage of their daughter Molly to David M. Randolph; in consequence of which the said Richard Randolph the elder agreed to make provison and actually gave *Presque Isle\** and *Dry Creek* to the said David M. Randolph.

Harry Randolph's deposition states, that the marriage of David M. Randolph was postponed, only on account of Col. Richard Randolph not having given his son David Meade Randolph certain property in fee simple in lands, &c; and which the deponent understood was to be partly in or about Bermuda Hundred. That the deponent remembers seeing a letter, signed by Colonel Thomas Mann Randolph, demanding a settlement prior to the said marriage; and this deponent understood that such a settlement was made.

Pending the suit, Hanbury as surviving partner of Capel and Ozgood Hanbury, and Main as executor of Hyndman surviving partner of James Buchanan & Co. were admitted plaintiffs, and filed their bill charging that the said Capel and Ozgood Hanbury had obtained three judgments of £ 1039: 0: 8 sterling each, against the said Richard

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\* This is the name of the Bermuda Hundred lands.

ard Randolph the elder, in the County Court of York, on the fixteenth of July 1770: That the said Richard the elder was indebted to the surviving partners of the said James Buchanan & Co. by bond, in a balance of £ 2355: 11: 3, on the 5th of July 1775; For which sums the plaintiffs respectively alk relief, having regard to the dignity of their debts.

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vs.  
Randolph.

The following agreement was entered into:

“ It is agreed in this cause that the judgment creditors are not to be considered as subject to the disadvantage attendant on their being plaintiffs in equity, with the admission of their having no legal title: nor are the defendants to be understood as admitting that they have a legal title; but it is agreed that the claim and defence are to be first considered as they would stand at law, and if the defendants have a defence at law they are to receive the benefit of it: If, on the contrary, it is the opinion of the court that the plaintiffs ought to succeed at law, then it is agreed that the case shall be so considered, and the defence of the defendants, as well legal as equitable, shall be estimated as it would be, if they were now praying to be relieved against those judgments. Any issue which the court may deem necessary may be directed notwithstanding this agreement. It is further understood that nothing in this agreement shall bar the court, if the right be determined in favour of the complainants, from extending the remedy according to the principles of equity.”

Pleasants as executor of Robert Pleasants also filed a bill for the amount of a judgment of £ 40, obtained against Richard Randolph the elder, in his lifetime, in the County Court of Henrico.

There is also a claim on behalf of Byrd's trustees upon a judgment of Henrico Court against

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 Randolph.

the said Richard Randolph deceased, on the 6th day of July 1784; on which a writ of *fiery facias* issued, and was satisfied, except as to £ 394: 15 9, which was enjoined by the said Richard the elder, but the judgment was revived, by *scire facias*, against his executors in the year 1788, as to the enjoined sum.

To these bills the defendant Richard Randolph and David Meade Randolph by answer deny any knowledge of Hanbury's judgments until after the death of Richard Randolph; that they are respectively purchasers for valuable consideration; and therefore they severally pray that their respective purchases may be saved to them, in the same manner as if specially pleaded; that, at the time of rendering those judgments, the said Richard Randolph the elder lived in Henrico County; that they believe the said judgments have been in the whole or in great part paid; and rely upon the presumption arising from length of time.

The defendant Richard Randolph, by way of amendment to his answer says, that on the 21st of March 1786 the said Richard Randolph the elder lay ill of the sickness of which he died on the 5th, of June 1786; That the portion of £ 1200 sterling promised by Robert Beverley in consideration of the marriage, between his daughter and the respondent, has been paid; that the executors of Wayles knew of the deed to the defendant, shortly after it was executed; that the deed was executed in consideration of the marriage contract; and that the defendant has mortgaged to Singleton and Heath.

The answer of Heath states, that the mortgage was made to him by the defendant Richard Randolph, who had a conveyance from, and was heir at law to the said Richard Randolph deceased; and that he is a purchaser without notice.

The answer of Singleton's executors states that the defendant Richard Randolph being seized

either

either by descent or purchase mortgaged to their testator.

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<sup>vs</sup>  
Randolph.

The executor of Hanbury replies, that he was a British subject; that the debts claimed are within the treaty of peace; that the defendant David Meade Randolph had notice of the judgments on or before the 1st of June 1791; that the plaintiff and the said Capel & Ozgood Hanbury have always resided in parts beyond sea, and out of the limits of Virginia.

Amongst the exhibits are copies of Hanbury's judgments; the bond of Richard Randolph the elder to Hyndman as surviving partner of James Buchanan & Co. and that to Bevins; the exhibits spoken of in the answers of Brett and Ryland Randolph, and the will of Richard Randolph the elder.

The Court of Chancery directed one of the commissioners to take an account of the lands, tenements and hereditaments, whereof the said Richard Randolph the elder was seized on the 16th of July 1770, and which descended to his heir at law, and also which were settled upon, or devised to any of his sons: and also to take an account of such parts thereof as had been conveyed, or otherwise disposed of by the said heir and devisees respectively, with the considerations paid, or secured to be paid for the same; and also an account of the permanent improvements, upon any of the said lands, tenements and hereditaments, made by the said devisees.

Upon the coming in of the report, the Court of Chancery delivered its opinion, that the deeds from Richard Randolph the father to David M. Randolph the son, said to be one "for his advancement in life," and the other "for his better advancement in life," might be averred to have been in consideration of the marriage, being congruous with the consideration mentioned in the deeds. That the judgments of Hanbury, and of

Byrd's

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Byrd's trustees, if revived against the heir of Richard Randolph the father, would not by relation defeat or impair lawful mine acts, such as those deeds, and the judgments and proceedings against Brett and Ryland: That the deed to the defendant Richard Randolph the son, if it had been cancelled and re-executed in March 1786, and had been altered in another part, would have been an act of that day, in the same manner as if another conveyance had been then executed; and, having been proved within eight months from that time, would have been good against the creditors of the father; although the marriage of the son and Maria Beverley, in consideration of which the conveyance was executed, had preceded; because marriage is a consideration continuing. But the said deed being only acknowledged before the witnesses who proved it, which could mean nothing more than an acknowledgment that the deed had been sealed and delivered on the day of its date, and the said deed being stated to have been made in consideration of a marriage to be had and solemnized, whereas the marriage had been actually solemnized before, could not be considered as an act of the day when it was so acknowledged, and consequently not having been proved within eight months from the sealing and delivery thereof, was void against creditors, by the words of the act of Assembly. That therefore, if the judgments of Hanbury had been revived against Richard the father, or his heir and devisees, writs of *elegit* or *levari facias* might, by the act of 1772, have been lawfully directed to the sheriff of any county, and, in that case, must have been first satisfied: But, not having been revived, they were not entitled to a priority against creditors of equal dignity. That, if Wayles' executors had taken an assignment to their trustee of Bevins's bond, they would, in his name, have been entitled to the same relief that Bevins himself would; and that a Court of Equity would have enjoined the heir of Richard Randolph

deceased

deceased from pleading payment by the sureties executors: That they ought to have the same remedy as if such assignment had been made; and that they had an equal right, with the judgment creditors, as the heirs were specially bound by the bond. Therefore that court dismissed the bill as to David Meade Randolph; and, declaring the lands, conveyed to the defendant Richard Randolph the son, liable to the creditors, deducting the improvements made thereon, by him, ordered a sale by commissioners. And pronounced the lands devised to Brett and Ryland, and which had been extended and sold for payment of the testators debts, to be exonerated from the lien, to which they would otherwise have been subject. From this decree Richard Randolph appealed to this court.

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On the day of pronouncing the decree, the following agreement was entered into, "The plaintiffs counsel agree that a suit, which is contemplated to be brought on behalf of Robert Beverley and Maria Randolph his daughter, in order to obtain a specific performance of the marriage contract in this suit alledged to have been made, for settling Curles estate on the marriage of the defendant Richard Randolph and the said Maria, shall not be prejudiced by the decree in this cause having been entered before such suit is instituted; but that the plaintiffs, in such suit, shall have the same benefit therefrom, as if the suit had been instituted prior to the pronouncing of the decree in this cause, provided that the said suit shall not be unnecessarily retarded, by the complainants in the said suit."

The bill by Robert Beverley and his daughter was against the plaintiffs in the other suit, and against Richard Randolph the son, and the executors of Richard Randolph deceased. It stated, that, in 1785, Richard Randolph, the son, applied to the said Robert Beverley for permission to address his daughter, the plaintiff Maria, in the

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way of marriage: That the said Robert informed him he should give his daughter a portion of £ 1200 sterling, in addition to a legacy of £ 500 sterling, upon which a considerable interest had accumulated; and therefore should expect that the said Richard Randolph the father would make a comfortable provision for his said daughter, and when this was properly done he should have no objection to the proposed marriage: That, in a short time after, the said Richard the son returned with the following letter from his said father. "Sir, the connection my son Richard is about to form, with your amiable daughter Maria, is perfectly agreeable to all his friends upon James river; and you may be assured, on so desirable an event taking place, I shall prepare for making the best provision, my situation will admit of, for their accommodation. The place where I now live, known by the name of Curles, in Henrico county, is what I intend for him, at the death of his mother and myself, with forty slaves; that is to say, eight men, six women, six plough boys and twenty children; together with the use of Turkey Island plantation, during the lives of Richard and Anne Randolph, when it is to revert to my estate again; and am with a tender of our compliments to the family, your most obedient servant. Richard Randolph. Curles July 20th, 1785." That the said Robert Beverley, thereupon, assented to the marriage, which accordingly took effect; and the plaintiff Robert hath paid the portion and legacy aforesaid: That the said Richard Randolph the father, intending to execute his promise aforesaid, made a deed to Richard the son for the Curles estate, upon the 20th day of September 1785, which was before the marriage. That the said Richard the father being ill of the sickness of which he died, and finding that he would be unable to go to court to acknowledge the deed re-acknowledged it before three other witnesses, on the 21st of March 1786, and the same was recorded in July follow-

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ing. That the deed varies from the articles, as to the interest which ought to have been granted. That the defendants have set up claims against the estate, alledging that the deed was not recorded in time. That the re-acknowledgment, if not equal to a re-execution of the deed, was agreeable to the construction of the act of 1748: That the original articles may now be enforced; and that compensation should be made for the loss of the interest in Turkey Island; the sales of which are in the hands of the defendant David M. Randolph as executor of the said Richard the elder. Therefore the bill prays that the deed may be established as far as it consists with the articles; that compensation may be made for Turkey Island; and that the plaintiffs may have general relief,

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The answer of the defendants admits the letter of the said Richard Randolph the father to the plaintiff Robert Beverley, previous to the marriage, but relies upon their rights as explained in the former proceedings and decree.

There was a narrative signed by the said Robert Beverley, which was admitted to be read in the cause, and is as follows. "When Mr. Richard Randolph jr. applied to me in 1785, for permission to address my daughter Maria, I observed to him, that as I should give my daughter twelve hundred pounds sterling, and Mr. Mills had left her five hundred more, upon which had accumulated a considerable interest, I should expect that his father should make a comfortable provision for him and that when this was properly done, I should have no objection to the marriage. In a short time after this was done he returned with the following letter. (Here follows the letter recited in the bill addressed to Mr. R. Beverley.)

Deeming the provision above specified adequate to the fortune I should give my daughter, and supposing that Col. Richard Randolph had a right to make the proposal, I told Mr. Richard Randolph junior

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junior the marriage might take place, but that without such a provision I should not have consented to it.

ROBERT BEVERLEY."

Blandfield March 4. 1797.

The Court of Chancery, for the reasons explained in the proceedings in the former cause dismissed the bill with costs. From which decree the plaintiffs appealed to this Court.

Both causes came on to be heard together in this court.

CALL for the appellants. There are four questions to be considered on the part of the appellants in these causes; 1. Whether the judgments bind the lands, in the hands of the alienees? 2. Whether the re-acknowledgment of the deed, from Richard Randolph the father to Richard Randolph the son, was effectual to convey the estate out of the grantor, from the date of the re-acknowledgment, so as to defeat the rights of creditors? 3. Whether if the re-acknowledgment be insufficient, the original agreement, on account of the fraudulent execution of it, may not now be enforced according to the first intention of the parties? 4. Whether if the deed, from Richard the father to Richard the son, be void, the mortgagees, as deriving title under the heir at law, will not be preferred to the other creditors?

I. The judgments do not bind the lands in the hands of the alienees; because no executions were sued within a year from the rendition thereof; and therefore the lien, if there ever was one, expired.

For the reason why judgments bind lands at all, is not that the statute says they shall be bound in so many words; but it is merely a consequence which the court draws from the statute, by holding purchasers to constructive notice of the judgment. So that the lien is created not by the statute,

nite, but by the knowledge which the court presumes the purchaser to have had of the judgment.

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But there is also a rule of law, that, after twelve months and a day have expired, the judgment shall be presumed to be satisfied, 3. *Black. Com.* 421. So that after twelve months and a day have elapsed, without any execution, the plaintiff is driven to the necessity of removing the presumption, before he can make his judgment effectual.

Thus then it appears, that there are two presumptions against each other, 1. The presumption of notice; 2. The presumption of payment: Of which, the presumption of payment is, at least, as strong as that of notice; and therefore is entitled to the same weight in the present discussion.

But if there be a presumption of payment, as well as a presumption of notice, and the equity of the parties be equal, the purchaser ought to prevail. For he had a right to make the same presumption of payment, which the law did; and therefore was guilty of no fault: Whereas, it was gross negligence, in the creditors, to suffer their judgments to sleep so long, without actually suing executions, or continuing the award of them upon the roll; so as to put purchasers on their guard. For it operated as a fraud upon the purchasers, which shall give them priority. It is like the case of an execution delivered to the sheriff and the property taken, but not sold, at the instance of the plaintiff; which will be postponed to a subsequent judgment and execution at the suit of another creditor. 1. *Vez.* 245.

Thus far upon principle; but a great writer states the very case, now under consideration; and decides against the lien. I mean the Lord Chief Baron Gilbert who in his book upon the law of executions, after having shewn, in the preceding pages, the time in which judgments, in personal actions, were to be executed, at common law, and that

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a judgment gave an authority to the party to sue execution within a year and day; but if he did not do it within that time, that it was presumed to be paid, adds, "This time of limitation of judgment, was not only in personal but real actions; for though the judgment on a real action settled the right of the land forever, as in the personal it did the right of the thing in demand, yet that judgment could not lie dormant forever, to be executed at any time; for then dormant judgments would over-reach conveyances between the parties, and therefore there was but a years time to execute such judgments, which judgment, over-reached all conveyances, and forced the party to an *audita querela*; but after the year, the judgment over-reached nothing; but he was put to his *scire facias* on that judgment, and not to his action, for the right of the land had been already determined, and therefore it was only to revive the determination touching the lands, unless something had been done by intermediate conveyances *Gilb. law Ex: 12.*"

This passage establishes all that I have been contending for; It shows the genius of the law upon subjects of this kind; and proves that the judgments do not over-reach the conveyances in the present case. For it would be difficult to conceive why a judgment should over-reach mesne conveyances in personal, and not in real actions; why, in a real action, where the land itself is demanded it should not disturb the purchaser, and in a personal action, where the land itself is not specifically sued for, it should; why in a real action, where the land itself is actually recovered, the conveyance should not be postponed, and in a personal action where money only is recovered and payment may be made various ways, that it should; finally, why in a real action, where the execution can only go against the lands, the purchase should be protected, and in a personal action, where the execution is usually issued against the person and effects in the first instance and the lands

lands are seldom resorted to, until all other means have failed, the purchase should be avoided.

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Perhaps it will be said that as the statute has now given a *scire facias* in personal actions a different rule will result; for the judgments might have been revived by writs of *scire facias*; and that when revived they would have related back to the day of the first rendition. That, however, would not be correct. 1. Because relations, which are legal fictions only, never have that effect: For they are created rather for necessity *ut res magis valeat quam pereat*; and therefore, they extend only between the same parties, and are never strained to the prejudice of innocent persons. 2. Because that argument is directly contrary to the doctrine laid down in the passage just recited. For the author expressly says that a *scire facias* lay at common law; and therefore, in this respect, the cases are alike: But when he speaks of an expired judgment, and says it will not over-reach, it is plain, that he must mean after it is revived; for until revived, it could not be enforced. So that in fact he puts the case of an expired judgment revived by *scire facias*; and decides that it will not over-reach. For it would have been nugatory, to have premptorily said, that the judgment would not over-reach, without mentioning, because not revived, if by a subsequent process, it could have been revived, and made to over-reach by relation.

But if, as was argued in 3. *Mod.* 189, the *scire facias* be a distinct action, and the judgment on it a new judgment, it is conclusive that the judgment on it does not relate back to the first, so as to avoid mesne purchases; because, in that case, it would be the second judgment which would bind, and not the first; as it is only by considering the first as the real judgment, and the second merely as an award of execution on the first, that the lien can be preserved. For the statute gives the *elegit* on judgments upon which executions may issue;

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but if the second be a new judgment, then the execution issues upon that; and of course the *eligis* could only issue upon the judgment in the new action or *scire facias*; which would create a new obligation, and would be the point from whence the lien would recommence. Accordingly in the case in the 3. *Mod.* where judgment was obtained against a feme sole, who afterwards married, and then a *scire facias* was brought against husband and wife, and, upon two *nibils* returned, judgment obtained against them; after which the wife died, and a second *scire facias* was brought against the husband alone; and it was held that it lay: Which could not have been the case, unless the judgment upon the first *scire facias* had been considered a new judgment altogether; for if it had related back to the first, that was a judgment against the wife only before the marriage, and therefore would not have bound the husband after her death.

This reasoning is strengthened by the act of Assembly concerning executions, which recites that the plaintiff may take execution within a year after the judgment; and therefore impliedly, that he cannot have it afterwards. But, when he can no longer have execution, the lien which arises from it must expire. For if the lien is created by the Court merely because the plaintiff has a right to sue execution, it must follow, that when he has no longer a right to the execution, there can be no lien. Because the lien, when the right to execution expired, lost its support; and to use the language of lord *Coke* on another occasion, became a flower fallen from the stock, without any thing to nourish and keep it alive.

These arguments are the stronger in *Hanbury's* case, when it is considered that at the time of the conveyances no *scire facias* could have issued on those judgments, without special leave of the court, on account of the length of time which had elapsed; because that increased the presumption

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of payment and more completely justified the purchaser. For where the plaintiff could not make use of the process of the Court *ex debito justitiæ*, it rendered the presumption greater that the right was extinguished.

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But there is another objection to those judgments, namely, that at the time of the rendition of them no execution could have been sued upon them into another county. But if the lands are only bound because execution might be sued against them, it follows, necessarily, that where no execution could issue against those lands, they could not be bound. For how absurd would it be to say that lands could be affected by a judgment, upon which no execution, that would reach them, could issue. It is like the case of judgments in the Federal Courts, which do not bind the lands in any other state than that where the judgments are given; because an execution cannot issue into any other state.

Nor does it alter the case, that, by the subsequent act of 1772, an execution against lands might be issued into any other county upon a judgment in a County Court. For the Legislature could not intend that it should relate to expired judgments, which could not be enforced without new process. The words of the act are opposed to that idea. For they give the clerk power to issue execution; which supposes the judgment to be capable of affording an execution, without any new act to be done. But when no execution could issue, it necessarily followed that it was not a case contemplated by the Legislature; And the Court will not extend the construction, in favour of a negligent creditor, to the injury of fair purchasers, who are seeking to avoid loss, in a case where they have honestly laid out their money, upon this specific property; whereas the creditor is seeking to *make gain* out of property which he did not particularly hazard his money on: and the principle

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principle of universal justice in such cases is, that his condition, who seeks to *avoid loss*, is better, than his, who seeks to *make gain*.

But as the judgment only binds in respect of the constructive notice, which is a legal fiction and a creature of the court, The court, by analogy to the record laws, will confine the lien to the same jurisdictions, and limits, as the recording of conveyances is confined to: Which will be no inconvenience to any body, as the creditor will have his lien over reasonable limits: and the purchaser will be exposed to no greater difficulty in enquiring for judgments, than he will for conveyances. Whereas the inconveniences, from a general lien all over the state, will be incalculable, and intolerable. For there are ninety County Courts, six Corporation Courts, and eighteen District Courts; besides the Courts of general jurisdiction. So that the labour of the purchaser would be endless, and he would sooner relinquish the purchase than encounter the difficulties.

But, in addition to this, the opportunities of fraud, which it would afford, would be infinite; for it would put it in the power of the debtor and creditor to deceive all mankind. Thus a man living in Henrico may have a judgment rendered against him over the Allegany; and seven and twenty years afterwards, this dormant judgment may be trumped up, in order to defeat a fair purchaser, who has honestly paid his money without the least suspicion of any incumbrance. An observation which is particularly applicable to the present case. Because here were judgments obtained, in York, 27 years before the commencement of the present suit; and it is now sought to charge them on lands in Prince Edward and Cumberland. Although no purchaser of those lands would ever have had the slightest suspicion that they were bound by a judgment in York.

But for other reasons, the judgments in York do not bind these lands. 1. Because

1. Because at the time of the conveyances no *scire facias* from a County Court ran into another county against the *terretenants*, who must be actually summoned in person or upon the lands; nor can it even now run into another county, upon such judgments. For the *scire facias* into other counties, given by the act of Assembly, is only against parties to the judgments and their representatives, and not against other persons. So that if the judgments were revived by *scire facias* against the executors, they would not be effectual against the purchasers.


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2. Because the *scire facias*, as between the plaintiff and the *terretenant*, is an entire new proceeding altogether; and, being an action concerning the realty, the *venue* must be land in the county where the lands lie, as necessarily as in an ejectment or writ of right; and therefore the County Court of York, having no jurisdiction of lands in another county, could not try the issue, which the *terretenant* might think proper to make. So that the *terretenant*, if accidentally summoned in the County Court of York, might plead to the jurisdiction of the court; or, failing to do so, he might state any matter in bar of the plaintiffs right, and then the Court of York, not having jurisdiction of the subject matter, must desist from further proceedings in the cause, in the same manner as every court of limited jurisdiction must do, whenever it appears that the question is beyond the bounds of their authority.

Therefore, under every point of view, it may be affirmed that the lien was at an end, and that Richard Randolph the elder might lawfully convey.

II. The re-acknowledgment of the deed was effectual to convey the estate out of the grantor from the date of the re-acknowledgment, so as to defeat creditors.

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This clearly consists with the view of the Legislature; for that was only to enable creditors and purchasers to enquire for the title and to find out the true owner of the estate: Which, is as effectually done by a re-acknowledged deed, if recorded; as by an original deed.

But then a technical reason is urged against it; namely, that the deed being good between the parties, the grantor had nothing to dispose of, at the time of the re-acknowledgment; and therefore the re-acknowledgment is void. That argument however is not sound. For if the mere execution of the deed passed the estate out of the grantor, as against creditors and purchasers, then the giving up the deed again to the grantor destroyed the grantees evidence of his title; and therefore the grantor might regrant either to the same or another person, *Litt. Sect. 377*: Where it is said "If the feoffee granteth the deed to the feoffor such grant shall be good, and then the deed and the property thereof bologneth to the feoffor &c, and when the feoffor hath the deed in hand, and is pleaded to the court it shall be rather intended that he cometh to the deed by lawful means, than by a wrongful mean:" Upon which Lord Coke observes "Hereby it appeareth that a man may give or grant his deed to another; and such a grant by parol is good. *Co. Litt. 232. (a.)*" These passages decide the very point; and shew that the grantee may give up his deed to the grantor, and that the latter may avail himself of the benefit of it. Of course it follows, that he may grant to whomsoever he pleases afterwards.

Nor could the grantee resume his title; for, as by statutory conveyances the estate only passes by the deed and not by transmutation of possession, it follows that, when the grantee cannot shew a deed, he can claim nothing in the land. Because to recover at law, he must produce the deed: But this he cannot do, when he has not the possession

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of it; and a Court of Equity would not assist him against his own voluntary surrender of the deed: Whereas the second grantee would always have it in his power to shew proper title papers; and consequently his right could not be disturbed.

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It is therefore like the case of a deed that is cancelled and afterwards re-delivered (which is admitted to be good;) because it is precisely the same thing, in principle, by whatever means the property in the deed is lost; for it cannot be material whether it is lost by this or that mode.

But the re-acknowledgment would pass an interest, if the estate, as between the grantor and grantee, was actually transferred. For if it was after the eight months, then it would pass the right, which had resulted to the grantor for the benefit of creditors and purchasers: And if it was before, then it passed the possibility of such reverter, as it is now clearly held that a possibility is assignable. 3. *Term Rep.* 88; For, the grantee being in possession under the grantor, the re-acknowledgment would operate either as a confirmation or release of the interest.

These observations have been made upon the supposition that the whole interest passed out of the grantor upon the first delivery of the deed. But in truth the deed passes nothing, as to creditors and purchasers, until it is recorded. For, as against creditors and purchasers, the act of Assembly makes four things necessary to be done, in order to perfect the conveyance. 1. Writing; 2. Indenting; 3. Sealing; 4. Recording. For the words are "That no lands &c. shall pass, alter or change from one to another &c. by bargain and sale, lease and release, deed of settlement to uses, of feoffment, or other instrument, unless the same be made by *writing, indented, sealed and recorded &c.*" So that all four are absolutely requisite against creditors or purchasers; and the absence of either of those things, will leave the estate, as to them, in the grantor still.

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It is therefore, as to creditors and purchasers, exactly like the case of the statute of enrollments in England, passed in the 27. *H. 8. Cap. 16*: From which our act of Assembly appears to have been copied; as the words are nearly the same, except that, that statute, although it says no estate shall pass without inrollment, does not declare, in so many words, that the conveyance shall be good between the parties to the deed, as our act of Assembly does: But, in practice, the courts, there, have put the same construction on it.

Now it has always been held under the statute of enrollments, that, until the enrollment is actually made, the estate abides in the grantor against creditors and purchasers: So here, the deed, until it is actually recorded, has no effect against either creditors or purchasers; but, as to them, the estate remains in the grantor. For the right of the creditors and purchasers is more than an *estoppel*; it is an actual beneficial interest, which the act prevents from passing out of the grantor at all, unless the prescribed regulations are observed. So that the deed before it is recorded only passes part of the interest out of the grantor and not the whole; like the case of a conveyance of an estate tail or any lesser interest out of the fee.

But then perhaps, it will be said that according to this construction a man would lose his estate, against creditors and purchasers, on the next day after his deed was executed, provided it was not previously recorded; although it might actually be recorded within eight months afterwards. This however would not be correct. For when it has been recorded it is good by relation from the day of the date. 2. *Inst.* 674. Because when several things are necessary to be done, in order to perfect any act, when the last is done it relates back to the first; and the whole are good *ab initio*. 1. *Wils.* 212. *Hob.* 22. *Ventr.* 360. Therefore although the deed is not good, as to creditors and purchasers

purchasers, before it is recorded, yet after it has been recorded it relates back to the delivery, and avoids the rights of all other persons indiscriminately; because the grantee, having by law eight months allowed him to record it in, was guilty of no fault in not doing it sooner; and as he had made the first contract, he had the first right in conscience. So that the relation in such a case wrought no injustice.

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But if nothing passed against creditors and purchasers by the first delivery, then the grantor had an interest to pass by the re-acknowledgment. For he had that portion of the estate which remained in him for the benefit of creditors and purchasers; and this interest he might well grant notwithstanding the deed, *Hinds case*, 4. Co. 71: Where, Hawe bargained and sold lands to Libbe, and before enrollment, levied a fine to him; and it was held that the fee passed by the fine. Which proves two things expressly, 1. That the estate remains in the grantor until the enrollment; 2. That the grantor may pass that estate to his own grantee. So that it is precisely our case, as far as respects creditors and purchasers; and proves that, as to them, the land is considered as remaining in the grantor until the deed is recorded; but that when it is recorded, it takes effect from the delivery by relation, and destroys the rights of the creditors and purchasers.

Any other construction produces inconsistency in the effects of the act. For if the deed *ipso facto*, by the first acknowledgment, passed the whole estate into the grantee, it would be difficult to conceive how it would revert in the grantor, for the benefit of creditors and purchasers, after the eight months had elapsed. Because the act does not declare that the estate shall revert, but that the deed shall be void only. Now the deed might be void, and yet the estate, once vested in the grantee, would remain there, and could not re-

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vest in the grantor, by the words of the act of Assembly, without a new deed.

But then it will be said that admitting this construction to be right, this was not a new deed, but a mere re-acknowledgment of the old one; which according to the Chancellors reasoning can mean nothing more than an acknowledgment that it was delivered the day of its first date. This position is never true; because when it is re-acknowledged, the grantor repeats the ceremony, and says in the presence of the witnesses that he acknowledges it to be his seal, and delivers it as his act and deed. So that it is in fact always an act of the day of its re-acknowledgment. But however true the position may be in general, it is certainly not so in this particular case. Because the grantor here has actually caused the real date of the re-acknowledgment to be noted by the witnesses; thereby manifesting his design that it should be considered as an act of that day.

Nor is it a circumstance of small weight that the general custom and practice of the country is conformable to the exposition which we contend for. Many deeds, soon after the act of Assembly was first made, were re-acknowledged and recorded in the proper Courts; and the practice has been continued in various instances down to the present day. So that the proportion of estates, held under deeds in that situation, is probably very great. Therefore admitting the construction to have been mistaken at first, it is certainly better that it should be adhered to, upon the principle, that *common error makes the law*, than that a third part perhaps of all the titles in the state should be overturned.

It is upon this principle that if a decision of a Court is against a statute, the decision, though wrong, will always after be adhered to. Yet the decision no more repeals the act, than the custom of the people; but the court adheres to it as a less evil than uncertainty in the law.

Accordingly

Accordingly instances are not wanting, both in England and in this country, where men acting under a common delusion with respect to the law, have been protected. Thus in the case of *Long vs The Deane and Chapter of Bristow* 1. Roll. ab. 378. Where a lease was made, by the Deane and Chapter, at a time when it was supposed that the statute of *Eliz.* did not bind the King, and afterwards it was held that it did; yet because the law had been mistaken the lease was supported. So in this court in the case of *Currie vs Donald* 2. Wash. 63, the custom of the country was mentioned as a circumstance of weight: And *Branch vs Burnley* \* Nov. 1799, was expressly decided upon the ground of the custom. The language of one of the Judges in that case, after stating the situation of the law record was, "In equity the custom is set forth, and though, as stated in the demurrer it was illegal, yet since the practice had impressed on the minds of the people, an idea of its legality, and under that idea the payment was made, he ought in this court to have the benefit of it." Now there can be no difference whether the custom is illegal by common law or statute. For the law is equally binding in either case, and therefore, if custom can sanctify a mistake with regard to the one, it may with regard to the other.

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There is nothing in the objection that the marriage was already had before the deed was re-acknowledged; because the recital should be considered as surplusage, and then the consideration of the money and blood was sufficient to pass the estate; which could not be avoided, because the marriage contract would prevent the conveyance from being considered as voluntary, in the same manner as if a deed is expressed to be made for the consideration of five shillings, when full value was actually

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actually paid, the estate passes and the true sum paid will secure it to the grantee.

The result is, that the re-acknowledgment was sufficient; and, as the deed was recorded within eight months afterwards, it is good against creditors.

III. But if the deed is void because not recorded within the eight months, then the contract was not well executed; and therefore on account of the fraud may now be enforced.

For the contract was not merged in the deed; because Beverley was no party to it; and did not even know that it had been made until long after the eight months had expired. It was therefore a transaction between other persons without his privity or consent; and consequently could not affect his contract, which he had a right to have effectually fulfilled.

The 4 *sect.* of the act of Assembly makes no difference; 1. Because that means the actual settlement itself and not the mere agreement for it. 2. Because that was intended to operate on the claims of the husband and wife or their trustees only, and not upon those of third persons. 3. Because Beverley was a purchaser for money actually paid; and therefore it does not stand on the common footing of a marriage contract. 4. Because the execution was a fraud upon Beverley. For the father and son, who pretended to have the articles executed and did not do it effectually, were guilty of a fraud, in the same manner as in the case of an underhand agreement to pay back money, contrary to the tenor of the contract. 2. *Pow: Contr: 164.* Others, therefore, will not be allowed to take advantage of the omission to record; for that, on account of the fraud can create no right. But Beverley is left, at liberty, to avoid what has been done, and to assert his contract. 2. *Pow: Contr: 55.*

But if the contract remains, then it specifically binds the lands; for the act does not avoid the contract but only the deed. So that if the contract was never merged it remained with all its consequences,

consequences, and formed a lien on the lands even against judgments. 2. *Pow. Contr.* 58.

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IV. If the deed be not good, and the marriage contract cannot now be carried into effect, still as the judgments are no lien on the estate, the mortgagees will be preferred.

Because they have the title of the heir at law; and being purchasers they have, at least, an equal equity with the creditors; Therefore having got the legal estate from the heir, they must prevail against the creditors.

Nor does the deed alter the case; because the resulting interest for creditors and purchasers descended on the heir, who might lawfully convey it: For the mortgage, which is a sale *pro tanto*, is good, although the heir will be liable to the creditors for the value of the alienations. This position, evident in itself, is particularly true in the present case; Because it is in his character of heir that Richard Randolph is sued. Which indeed was absolutely necessary; for in any other mode he would not have been liable; nor could a suit in any other form have been maintained against him; because the statute only renders devisees liable; and as he was not a devisee, if the deed be void, and the same as if never made, he must be liable as heir or not at all.

The mortgagees therefore have got the legal estate; and the Court will not take it away, from them, in favour of the other creditors who have no superior equity.

DUVAL on the same side contended, that Richard Randolph the son was a *bona fide* purchaser of the estate, and therefore would not be affected by implied notice of the judgments: 1. *Eq. cas. ab.* 354; 2. *Eq. cas. ab.* 682. 1. *Ca. ch.* 37. That the re-acknowledgment of the deed was sufficient; or if not, still it would operate as a covenant to convey; or if the deed was void, that the fee descended

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descended on the son, who might fence against the creditors with the equity arising out of the contract. Upon which points he cited *Shep. Epit.* 273: 407. *Cro. Eliz.* 217: 2: *Eq. cas. ab.* 683. 1: *Eq. cas. ab.* 358. That the judgments were not a lien after the year and day; for the negligence of the creditors will postpone them. Besides, as to some of the lands the judgments never did affect them; because they were purchased by Richard Randolph the elder, after the rendition of the judgments. In support of these propositions he referred to 2. *Eq. cas. ab.* 684, 362. 3. *Atk.* 273. 357. 2. *Inst.* 470. 2 *Salk.* 598. 2. *Bac. ab.* 343, 362, 364, 596, *Roll.* 470. *Cro. Jac.* 424: 477. 2. *Hugh ab.* 790, 893. 2 *Mo. Ent.* 390. 391.

HAY for the appellees. Made four points. 1. That Wayles' executors were creditors by bond. 2. That the judgments were a lien on the lands. 3. That the deed was void as to creditors. 4. That the deed to David Meade Randolph was not for a valuable consideration. Which observation, he said, also applied to that of Richard Randolph junior, for the Curles estate.

As to the first point:

The effect is the same, as if Bevins himself had sued; for the debt was originally due by bond; and if the money had been paid by a person not security thereto, and he had taken an assignment of it, he would have been a bond creditor. So if the executors of Wayles had had it assigned to a third person for their use; because a Court of Equity would not have permitted the defendants to plead the payment. If bond creditors are satisfied out of the personal estate, the simple contract creditors shall have payment out of the real: Which is more than what is contended for here. Because there the satisfied bond is revived in favor of another person; but here it is only asked that the same bond may be made effectual in favor of the representatives of one who was originally

ally a party to it; and this for the benefit of the security too, which is a favorable case.

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As to the second point:

If the judgments gave a lien, when in force, they will when revived. There is no necessity for taking out execution, but the plaintiff may continue the entry on the record. 2. *Bac. ab.* 362; and therefore the lien attached notwithstanding the subsequent alienation of the land. The *Stat.* 13. *Ed.* 1. which gave the *scire facias* makes no other difference in the common law, than merely to continue the execution, and enable the plaintiff to carry the judgment into effect at a later time than he could have done at common law. So that, upon this statute execution may go at any time, if the notice mentioned in the act is given; and therefore, upon Mr. Call's own ground, the lien continued as the execution might be issued. If the plaintiff sues an *elegit*, although he never executes it, or makes an entry on the roll, the lien will continue and he may defeat a future sale. Therefore the argument, on the other side, goes to prove, that there is a difference between a judgment revived by the law, and one kept alive by the party himself; which cannot be true. The *scire facias* is but a mere judicial writ; and the entry is, that the plaintiff may have execution of the judgment; upon which no damages are given. So that to every intent it is but a mere restitution of the original judgment and its consequences. Of course, if it ever was a lien on the lands, which is admitted, that lien remains unimpaired.

As to the third question:

The deed not having been recorded within the time prescribed by law is absolutely void; or else the ways of law, like *The ways of Heaven, are dark and intricate, puzzled with mazes, and perplexed with errors.* The re-acknowledgment has not the effect which has been contended for; because

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the act is that the recording of the deed shall take place within eight months from the sealing and delivery; which means the original sealing and delivery, and the subsequent re-acknowledgment is vain and ineffectual. *Shep. touch.* 69. If the deed had been delivered up to be cancelled, it would have been good; but this was not done in point of fact; and therefore the defendants must contend, that it was a surrender of the old deed to be cancelled. But that position cannot be maintained; for the fact is not so; and the re-acknowledgment only amounts to a confession that he delivered it on the day of the original date: Whereas a new deed implies the contrary; for a new deed respects time future only, but the old deed comprehends also the interval of time between the date of the old deed and the re-acknowledgment. That the re-acknowledgment is vain is clear from *Perkins Sect.* 154, who says, "It is to be known that a deed cannot have effect at every delivery as a deed; for if the first delivery take effect, the second delivery is void. As in case an infant, or a man in prison, makes a deed, and deliver the same as his deed, &c. and afterwards the infant when he cometh to his full age, deliver again the same deed as his deed which he delivered before as his deed, this second delivery is void. But if a married woman deliver a bond unto me, or other writing as her deed, this delivery is merely void; and therefore if after the death of her husband she being sole, deliver the same deed again unto me as her deed, the second delivery is good and effectual." This doctrine, which is confirmed by Lord Mansfield in *Goodright vs Straphan, Cowp.* 204, proves, clearly, that a re-acknowledgment, where the first delivery has actually had effect, has no operation. But in the present case the original execution and delivery of the deed had full effect, and therefore the subsequent re-acknowledgment was void. It is said, indeed, that no estate passed until the deed was recorded; but,

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by the express words of the act, the deed is good between the parties: Which completely answers the argument. When the deed was re-acknowledged the estate was already in the grantee, and therefore the only effect of the doctrine, contended for on the other side, would be to give a longer time for recording the deed than the law allows. But if the re-acknowledgment would have been good, between the parties themselves, as a new deed; yet, the positive words of the law had already operated on the old one, so as to avoid it in favour of the creditors; and had put it out of the power of the parties to defeat them by any act of theirs.

As to the fourth point:

The question is if this princely provision by a father for his son shall be good against creditors? There is no decision in this state which supports the claim set up in favor of the son; and the welfare of the country is certainly opposed to it. The deed itself shews him to be a mere volunteer, and if it was for a valuable consideration he ought to prove it. Even marriage is not shewn to be the consideration. The letter of Thomas Mann Randolph, which says that he would consent, if Richard Randolph the father would give his son David Meade Randolph an estate and put him into possession of it, does not alter the case. For if a father conveys an estate to his son, without any previous treaty it would be clearly void; and then the question is, whether there was a sufficient communication in the present case? The letter states that the writer will consent, if the estate is given; but it does not appear that Richard Randolph the father was at all moved thereby. For in his letter to his son *David* he takes no notice of it; but appears to have acted from parental tenderness only. His language is, that he had long intended to give him the estates. So that he, in fact, only gave it at one time instead of another. The deed was written under the direction of Richard

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ard Randolph and only states affection and advancement. Thereby plainly proving, that he did not act under the idea of a contract, but from motives of affection only. Consequently unless it could be shewn, than if a father makes a conveyance because his son is about to be married, it will be good against creditors, the defence in the present case cannot be supported. For it makes no difference that Thomas M. Randolph required it as a condition; since it does not appear that the requisition had any effect, upon the mind of Richard Randolph. Besides, the letter did not ask a settlement on the wife; but merely on David himself; so that the interest of the wife does not appear to have been contemplated. If it had required a settlement on the husband and wife, and the conveyance had pursued the requisition it might be argued from; but here was nothing to shew that any regard was paid to the wife; and although Thomas M. Randolph might have intended her benefit, he did not say so; and, Richard Randolph was not bound thereby, if he had. Richard Randolph was largely indebted at the time, and Thomas M. Randolph, who was his security in one instance, knew it. His object therefore, was to put the property out of the reach of the creditors; and consequently, as to them the transaction was void. But, if that was not the motive, still it was voluntary, and therefore of no effect against creditors. So that either way the conveyance forms no defence against the creditors, Richard Randolph perhaps acquired credit on this very property; and therefore the creditors ought to be satisfied out of it: Especially as *David* shews no settlement; but may do as he pleases with it under the deed, and may totally deprive the wife and children of it. Therefore, if marriage be a sufficient consideration against fair creditors at all, yet, as it is not shewn to have been the consideration of the present deed, it will not avail the defendants in the case before the Court; but ~~this~~

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property as well as Curles, will be declared subject to the demands of the creditors.

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WARDEN *contra*. Spoke to the same effect with Call, and cited in addition *Com. Dig.* 63-4. *Gro. Jac.* 52.

MARSHALL for the appellants. 1. The executors of Wayles are not specially creditors. For the original debt has been paid to the obligee and no action to recover it, is sustainable at common law; because the bond having been paid off, and not assigned, lost its obligation. It is not true that the executors are in the place of an assignee; for the assignment preserves the bond, but the payment destroys it.

The principle that the court goes on, in the case of marshalling assets, is not correctly stated, by the opposite counsel; for it is not that the specialty debt, is revived in favor of the simple contract creditor, but that the specialty creditor, having two funds, has contrary to equity, taken the personal estate from the simple contract creditor, and thereby let the real estate which ought to have contributed, go quit of bearing any proportion of the debts. An act which operates as a fraud; because it relieves the land that was justly bound, to the prejudice of a fair creditor, contrary to the rule of equity, which uniformly compels the party, having two funds, to resort to that, which does not interfere with the claim of him, who has but one. But that is not our case; For this is not a question concerning the unjust exercise of a right against two funds: but whether a man, who has paid off another's debt, without taking an assignment of it, shall be permitted to the prejudice of third persons, to revive the debt which had been extinguished by his own act? It is therefore not within the principle of marshalling assets.

Moreover that principle is never applied to affect a purchaser; because he has as much equity as  
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the claimant, and he has the law besides. But, in this case, a Court of Equity is called on to assert, to the injury of fair purchasers, a principle invented for the sake of affecting justice. An attempt contrary to the nature of that court; which always refuses to act when injustice would follow from it. But in the present case the plaintiffs had at most only an equitable claim; and therefore it would be monstrous to set it up, after it had been extinguished, in order to avoid the mesne acts of others.

The question has a great resemblance, in principle, to the case of old incumbrances in the doctrine of mortgages. For, there, an old incumbrance will protect a latter mortgage, if it has not lost its legal force; but, if it has lost its legal effect, it will not, *Pow. Mortg.* 215. So in this case the bond, if it had not lost its legal effect, might have availed the plaintiffs; but having been paid off, by one of the obligors, its legal force is gone; and therefore the executors can only be considered as simple contract creditors.

2. The judgments are not specific liens on the lands.

At common law lands were not bound, and the lien is only in consequence of the statute; which does not bind them, in express terms, but only by implication. The lien is a mere creature of the Court, resulting by construction from the election given to the creditor by the statute; and therefore the Court will never extend it beyond the limits of public convenience. No case has been produced where lands conveyed after the year and day were held to be bound; nor indeed can such an inference be fairly drawn, when there is no right to take an execution. For the lien is predicated on, and is only co-extensive with the right to take execution. If the case be taken by analogy to real actions it is clear. For in those the lien is gone when the right to take

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execution ceases; which is the same principle contended for, in the case now before the Court.

It is said that the *scire facias* revives every thing. But that can only be where the right is continuing; for it cannot retroact upon a mesne act, where the right has ceased. The statute which gave the *scire facias* does not say it shall overreach mesne acts; and the lien is gone before the *scire facias* becomes necessary.

The argument, that the *scire facias* is a judicial writ, and that a release of the execution will discharge it, proves nothing; for it will also be released by a release of all actions; and therefore it may as well be called an action as an execution. Relation is fair between the parties; but it would be iniquitous, that it should have effect, against third persons; and accordingly it never does, unless, in favour of one who has a superior equitable or legal right. Suppose a legal title extinguished and afterwards revived, would this revival avoid the mesne act against a third person, who had innocently acquired a title in the mean time? It would be shocking that it should; and the law would never countenance such injustice. Yet that is the amount of the principle contended for, on the other side.

It is said that since the statute, if notice is given, execution may go at any time. But this is contrary to all practice; the statute never was so understood; and the mischiefs of such a doctrine, to creditors and purchasers, would be incalculable.

It is not true that there is no difference between the case at bar, and one where the plaintiff continues his *elegit* on the roll. For the continuance is a notice to the world, as much as the original judgment, and of itself imports that the judgment is not been satisfied; whereas, when no farther steps are taken, it affords a presumption that the judgment has been satisfied. This

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doctrine is applicable to all the judgments; but as to those of *York* Court it is entitled to still greater weight. For, as it is the case of a lien by implication merely, it will not be extended, by the court, to all judgments indiscriminately.

Generally speaking when the law obliges a man to take notice of any act, it affords the means of doing it. But how can that take place, in the case of County Court judgments? For the County Courts are so numerous that no prudence or industry could enable a purchaser to guard against them. No matter how many transfers may have taken place; no matter how many years may have elapsed since the judgment was rendered; no matter how many precautions may have been taken to guard against injury, the judgment would overreach them all, and bind the lands in the hands of the innocent purchaser. So that the shackles on property would be infinite; especially, when it is considered that judgments are always docketed in the names of the plaintiffs and not of the defendants: A purchaser therefore, before he could venture to contract, would be obliged to search through all the judgments of all the courts in the country. A labour which would be endless, and the pursuit intolerable.

The true idea therefore is, that the lien should be confined to the same courts, which the law requires the recording of deeds to be confined to. So that a man should not be obliged to search further for a judgment than for a deed: Especially as the Legislature by the record laws meant to favour and secure purchasers; and therefore the court ought not, by mere construction and implication, to raise up an inference, entirely contrary to the spirit and intent of those laws; but on the contrary should promote the object of the Legislature as much as possible. It is not to be believed, that the Legislature could intend that the implied lien should extend every where, when the express lien was confined to certain limited jurisdictions.

Because

Because the danger from implied liens, was much greater than from express liens, and therefore more to be discouraged.

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But the necessity of a *scire facias* against the *terretenants* is decisive; for there could be no such proceeding where the lands lay in another county; and therefore as the *terretenant* could not be brought before the court, the lien could not be revived by the *scire facias*. In such a case there can be no inference of notice; because the lands could not be reached in the hands of the *terretenants*, between whom and the creditor there is no privity; although it may be otherwise as to the heir on account of the privity between him and the creditor.

Therefore whether the principles of the common law, the object of the Legislature, or the reason and convenience of mankind be consulted, it will be found to be true, that the judgments constitute no lien upon the lands in the present case.

3. There is no question, but that the policy of the record laws may be as well answered, by allowing a re-acknowledged deed to prevail, from the time of its re-acknowledgment, as by allowing an entire new deed to have effect from its date. This position has been stated by us, and has not been answered by the counsel for the appellees. Nor indeed can any just answer be given to it. For, in both cases, not more than eight months will elapse between the acknowledgment and the recording of the deed; and that is all which the policy of the law appears to have required.

But, forsaking this point, the counsel for the appellees insists that the act of Assembly is express, that it shall be recorded within eight months from the execution of the deed, and that a plain man would necessarily so understand it: Therefore he concludes that a second acknowledgment will not supply the omission. He admits however, that if

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the deed had been given up to be cancelled and then had been re-acknowledged, it would have operated as a new deed: Which is not very consistent with the other position contended for by him, that nothing could pass by a subsequent deed; or with the words of the act of Assembly, according to the construction which he puts upon them. For how, in the case he supposes, would the estate get back to the grantor, or how could he have any thing for the second delivery to operate on, if the whole was out of him? This very admission necessarily proves that the grantor has an interest, which he may grant, so as to be effectual against creditors from the second delivery; or else the new deed would have no effect at all; which is contrary to the terms of the admission.

It is said however, that the re-acknowledgment was no delivery. But for what purpose was it made then? Certainly the intention was to deliver; and here the evidence is express that it was delivered on the date of the last acknowledgment. Besides there ought to be positive evidence of the first execution of the deed; and I submit it to the court whether that be proved or not.

But it is argued that if the re-acknowledgment be a second delivery, that still the second delivery was void and *Perkins* and *Cowper* are cited in support of the position.

The case in *Cowper* was that of a re-delivery by one, who was a feme covert at the time of the original delivery, but sole at the time of the re-delivery; and, if it proves any thing, it rather supports what we contend for; because it was decided there, that the re-delivery amounted to a confirmation, and that circumstances might amount to a re-delivery. The same argument would apply, with equal force, in the present case, as the first delivery has been rendered void, as to creditors and purchasers, by the statute.

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The passage in *Perkins* is of a case where the first delivery takes effect; but we insist that the estate in the present case remained in the grantor, as to creditors and purchasers; and therefore that the second delivery did operate. For our law is like the English statute of enrolments, and therefore as against creditors and purchasers the estate does not pass out of the grantor until the deed is recorded. But it is said that the 4th section makes a difference; because by that the deed is to be good between the parties. The cases cited though, prove, that to be nothing more than the English Judges had, by construction implied before; and it was probably inserted, in our statute, in conformity to their decisions. The only difference therefore is, that in England the Judges declared it to be good, between the parties, upon principle and construction; but in this country the act of Assembly, pursuing the course of their decision, has declared it so in express words. If this reasoning be correct, then *Hindes case 4. Co.* shews that there may be a second delivery, which will not only confirm the estate between the parties themselves, but will be effectual as to every other purpose. Indeed the contrary doctrine would be intolerable; as, according to that idea, a defective deed could not be made effectual by any conveyance. There is no similitude therefore between the case in *Perkins* and that under consideration. For *Perkins* supposes a case, where nothing remained in the grantor; but here we prove an existing interest which he might part with; and if he could grant it at all; he might as well convey it to his own grantee, as to any other person.

It was said that according to this argument a judgment between the date and recording of the deed would be good against the grantee; although the deed should be actually recorded within eight months from its original date. But that position is not sound; for the judgment would by relation, be over-reached by the recording of the deed according

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according to the doctrine in *Hindes* case, as there would be no injustice in it. For as the first purchaser would have the first right in equity, no injury would be done to those whose rights were subsequent to his. From all this, it follows, that the re-acknowledgment was clearly good; and therefore that the creditors cannot affect the lands.

4. But the mortgagees have clearly the first right; because they had both titles, that is to say, the title under the deed, and that by descent.

For 1. Their case resembles that of the alienee of a devisee, whose right will be good against creditors, although the devisee himself continues liable to them. For the statute of 3. *W. and M.* like our act for recording deeds, expressly declares that the devise shall be void against creditors; but nevertheless the title of the alienee of the devisee is good, and the estate cannot be touched in his hands, *Mathews vs Jones*, 2. *Anstr. Rep.* 506. In that case it was expressly argued, that the devise being void as to creditors, nothing passed by it, as against them; and of course that the devisee could convey no estate to their prejudice. But the Court unanimously held, that the devise did pass the estate so as to enable the devisee to alien, and that he would only be personally liable. The same doctrine applies to this case; For the conveyance here will be good except against creditors, and the alienation by the grantee will be good, altho' the grantee will be personally liable to the creditors. For the two statutes are equally strong and the principles precisely the same. Before the record laws in this country, the alienation would have withdrawn the lands from the creditors here, in the same manner as the devise there; and of course, if the alienation of the devise there will prevail, so will the alienation of the grantee here.

But 2. If this doctrine were not true, then the consequence inevitably would be that the title of the mortgagees under the lien must prevail. For if the conveyance is void altogether, then it is the same

same thing as if it had never been made; and in that case Richard Randolph must, as to the creditors, take as heir necessarily. But, if he took as heir, then the mortgages by him are certainly good. Because alienations by an heir are good, although he is liable to the creditor for the value. But a mortgage is so far an alienation; and therefore necessarily good.

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5. The conveyance to David Meade Randolph is not liable to exception.

It is in vain to argue, that a considerable property has been conveyed, without any valuable consideration paid for it. Such an argument may be proper to the Legislature, but not to the Court. As it is no longer a question, whether a conveyance, in consideration of marriage, be sustainable or not. For the law is settled, that such a conveyance is good.

But it is said, that a voluntary conveyance to a son, about to be married, is void. As that however, is not the present case I will not say whether the position be correct or not; but there are some cases which might make it very doubtful. As for instance in the case of the *East India Company vs Clavel*, 2. *Bac. abr.* 607. *Prec. cb.* 377. where A, agreed with the East India Company to go as president to Bengal, and entered into a bond of £ 2000 for performance of articles; but before he set out he made a settlement of his estate, and among other things he declared the trust of a term of 1000 years to be for the raising of £ 5000 as a portion for his daughter, who afterwards married I. S. a gentleman of £ 700 per annum, who before the marriage, was advised by counsel that the portion was sufficiently secured, and who afterwards on her death, had at her request expended £ 400 on her funeral, but never made any settlement on her; and A. having embezzled the goods and stock of the company to a considerable value, the question was,



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was, whether this settlement was voluntary and fraudulent as to them; and it was held to be a prudent and honest provision, without any colour of fraud; and though in its creation it was voluntary, yet being *the motive and inducement to the marriage*, it made it valuable. This case and others which might be mentioned seem to refute the position advanced on the other side; but, deeming it altogether unnecessary, I shall not go into the argument of that point now. Because an express marriage contract has been proved in our case. The letter of *Thomas Mann Randolph* and the depositions of Richard and Harry Randolph, shew that the marriage was suspended until the conveyance was made. The letter of Richard Randolph the father to *David* was clearly intended as an answer to that of *Thomas Mann Randolph*. For, in it he says that he had been looking out for an estate, ever since he heard of his addressing the lady; and that, in consideration of the marriage, he would give the property. The conveyance was the real ground upon which the consent of the lady's parents was obtained; and without it, the marriage would not have taken place. So that it is much stronger than the case of the *India Company vs Clavel*; because here was an actual treaty for the property, but there was none in that case. To which may be added that without the marriage *David Meade Randolph* could not have compelled a conveyance.

It is objected though, that he also says, he intended to give him the same property before. But can that destroy the claim arising from the marriage? Surely not; for it is saying no more than was necessarily implied: because, before he would enter into the agreement, he must have been previously disposed to give the property. So that the objection does in fact amount to no more than this, that a man who is disposed to make an agreement ought not to make it, because he was previously disposed to do so.

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It is said however that the letter from Richard Randolph to David M. Randolph does not refer to that of *Thomas Mann Randolph*. But the contrary is expressly proved. Besides, if it removed the objections of Thomas Mann Randolph, it was the same thing.

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Another objection raised is, that the conveyance is to David Meade Randolph, and not to his wife. But so was that in the case of the *East India Company vs Clavel*; and yet the settlement was held good. Besides the estate contributes to the benefit of the wife and her family; and the husband cannot deprive her of her right of dower in it. So that she in fact is benefited by it. In the common cases of settlements on marriage the remainder is generally limited to the husband and his heirs; Which, according to the doctrine contended for by the opposite counsel, would be void; but the marriage has always been considered as protecting the whole settlement.

It is urged, that it is mockery to say, that the letter turned him into a purchaser. But in point of law it does; and although he may afterwards defeat the provision, by squandering or alienating it away, that will not alter the case. For there is a confidence that he will keep it; and as the object was the ease and comfort of the daughter and children, that end was thought to be sufficiently attained by the conveyance to the husband.

But a singular objection is raised, namely, that Thomas Mann Randolph must have known of the embarrassment, under which the affairs of Richard Randolph were, at that time. Now, besides that such knowledge is not necessarily to be inferred, from any proofs in the cause, it cannot be contended that that circumstance would make any difference in law. For most marriage settlements originate from apprehensions of that kind; and therefore the knowledge instead of operating against the conveyance would rather strengthen it. Because *Thomas Mann Randolph* would not have permitted

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permitted the marriage without it, and the testimony expressly proves that to have been the consideration of the conveyance. The words of the statute of *Eliz.* are not opposed to this doctrine; in which nothing, relative to such a case, is said: Nor indeed does that statute render even mere voluntary conveyances void, unless made to deceive and defraud creditors. 1. *Eg. cas. ab.* 149. But that is not important to be inquired into in the present case; because here was a sufficient consideration in law to support the conveyance.

As to the form of the deed, it is to be remembered, that Richard Randolph the father had not got the legal estate conveyed to him, as to part of the lands, when the marriage contract was entered into, but David procured it afterwards; and therefore the argument contended for, with respect to the form, does not apply, as to that part. But, independent of that, if the deed does not secure the estate according to the terms of the agreement, then it is contrary to the contract, which the court will consider as still standing, and controuling the deed.

RANDOLPH on the same side, before Wickham began, stated that articles in the form of a deed would be good. 1. *Wms.* 339. *Pow. Contr.* 432. 334. That if the deed was improperly recorded the court might still order it to be done so as to have the effect intended; and that the consideration might be averred in the case of David Meade Randolph. Upon these points he cited. 1. *Wms.* 339. *Pow. Contr.* 432, 334. 3. *Term rep.* 1. *Ch. cas.* 37.

WICKHAM for the appellees. The judgments bind the lands; for all judgments give a lien; and it is not important whether this be a rule of the common or statute law: Although it may perhaps be affirmed that the lien existed before the statute; as there was a *levari facias* against the issues, which Lord Coke says are the land itself. However, whether it proceeds from the common

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or the statute law, it is equally clear, that it extends to all the lands; as well those, owned at the time of rendering the judgments, as those acquired afterwards. 10. *Vin. ab.* 563. But it is said that the judgment only binds for a year; and *Gill. law of exns.* 12. is relied upon. That book though, speaks of the law before the statute which gave the *scire facias*; and in a subsequent page it states a different rule. It is said that there is no instance of a lien where more than a year has elapsed. But the argument of Mr. Hay is just, that the *scire facias* merely revives the judgment itself. The precedents, to that effect, are numerous; and the general doctrine is contained in 3. *Co.* 13. (b.) And if analogy be attended to, it will be perfectly clear. For instance, if the debtor die, still the lands are bound in the hands of the heir, notwithstanding the necessity of a *scire facias*. Of which many cases may be produced; and although writs of *scire facias*, to ground the *elegit* in the debtors life-time are more rare, this is owing to there being no necessity for actually issuing the *elegit* in that case. 4. *Bac. abr.* 412. But if there be a lien notwithstanding the necessity of a *scire facias* in one case, why not in another? Perhaps it will be said that the election should be made within the year. But that is not so; for he may do it when he will. Against the heir clearly; and therefore against the terretenant. Because a *scire facias* may issue against the heir and terretenant jointly; 4. *Bac. ab.* 418. It is said that the *scire facias* is necessary, because the judgment is presumed to be satisfied. But that is only *prima facie*; and therefore, when the writ has issued, the defendant must plead and prove payment. The right to execution exists at the time of the *scire facias*, for the very writ supposes it; and the issuing of it is only required, in order to give the defendant an opportunity of proving the payment. It is said that a *scire facias* is released by a release of all actions; but a release of all executions has the same effect.

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Which proves that the judgment is the principal, and that the *scire facias* is but auxiliary, and partakes more of the nature of an execution. The case cited from *Vez.* is not material; because possession is evidence of property; and therefore creditors and purchasers are liable to be deceived; but lands always depend upon title, and ignorance of the plaintiffs right is no defence. That the lands lay in another county will make no difference; for still they are bound; in the same manner, as in the case of a *fieri facias*; by which the property is bound from delivery of the writ to the officer, although the goods be in another county. The inconvenience of the doctrine has no weight in a Court of Justice, however proper it may be to the Legislature; for inconvenience never is allowed to do away a positive right. *Wilson vs Rucker* \* in this court the other day, was a strong case to that effect. As to the charge of neglect it ought to have no operation on the question. For the judgments were originally entered as a security for the money, and that payment was urged appears by the letters: Besides that, the fee bill soon after expired, and some of the plaintiffs were British creditors and could not sue. It is said that there could be no *scire facias* into another county; but there is a difference between issuing and serving of the writ. For a return of two *nibils* would be sufficient; and no venue was necessary, as was supposed. Neither is there any difference, in law, between the case of one who seeks to make gain, and one who seeks to avoid loss. There is no reason for confining the lien, according to the restrictions of the record laws. For although it may be difficult, for the purchaser to know, whether there be any judgments against the debtor, it is not impossible; and therefore the rule of *caveat emptor* applies. For he should buy of one who is able to give a good title, or a sufficient warranty. The case from 1. *Ch. cas.* does not

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\* 2. Call's Rep: 500.

not apply; because that was a case in equity; but the present case is to be considered, as if it was in a court of common law.

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Wayles's executors are bond creditors. For at the time of bringing the suit the bond was not satisfied; and therefore the obligation was then actually subsisting. It is said however, that the principle of marshalling assets depends upon the specialty creditor having two funds, and being, therefore bound in conscience to go against the realty, in order that the simple contract creditor might be satisfied out of the personal estate. But specialty creditors may resort to which fund they please; and equity puts the simple contract claimants in their stead, if they go against the personal estate instead of the lands. Of course, if the deed is void, the executors, as specialty creditors, may charge the lands. For the court can with the same propriety put them in the place of Bevins, as the simple contract creditors in the place of the bond creditors in the other case. If there be a difference it would seem to be in favour of the executors in the present case; because of the privity between the parties.

The deed for the Curles estate is clearly void against creditors. The words of the law are express and clear; and no abstract reasoning is either necessary or proper in order to explain it. The policy of the law was to prevent secret conveyances; but the construction contended for, on the other side, tends to encourage them and to elude the law. The second delivery of the deed was clearly void *Shep. Touch.* 72, 60; and, if there be no proof to the contrary, the inevitable presumption is, that it was executed upon the day on which it bears date. Here then was a complete delivery, and from that time the whole estate was out of the grantor, who had nothing to grant after that; and therefore, according to the authority, the second delivery was merely void. There is a wide difference between a re-acknowledgment,

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ledgment, and a new deed after the first is cancelled; for in the latter case the estate is gone back from the grantee, who no longer hath any thing in the land; but in the other case he has the whole estate in him still. The case is not like the statute of enrollments in England; because there the statute is positive; that the estate shall not pass until the enrollment. 2. *Bac. abr.* 338. But our act of Assembly is expressly otherwise; and, in effect, declares that the estate shall instantly pass to the grantee. As to the argument derived from what is called the custom of the country, it is entitled to no weight; for a custom, however general, cannot change a positive law: but the truth is, that the custom spoken of is more general in the case where the eight months have actually expired, than where, as in this case, the re-acknowledgment was before the expiration of the eight months.

Beverley's articles will not help the appellants. Such a decision would repeal the act of Assembly, which expressly requires that all such contracts shall be recorded; and although the two Randolphs may have practiced a fraud upon him, that will not alter the case, or destroy the effect of the act.

The claim of the mortgagees is no better than that of the other appellants. To entitle them to any preference they should have been purchasers without notice; which must be plead and cannot be affirmed at the hearing, *Mitf. Plead.* 215. 1. *Atk.* 571. 1. *Bro. Cby.* 353. That Richard Randolph was heir to his father, makes no difference; because the descent was broken. The case cited from *Anstruth.* proves nothing in favor of the appellants. For before the statute, the heir was only liable for the lands remaining in his possession at the time of the suit, but as to those previously aliened he was exonerated; and as the statute only put the devisee on the same footing with the heir, it followed, that the lands which were alien-

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ed; before the suit brought, did not remain liable in the hands of the alienee.

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As to the case of David Meade Randolph, it is on the face of the deed a voluntary contract; and as the evidence is not positive we must recur to the deed itself; especially as the deed and evidence do not agree together. The case cited from 2. *Bac.* 607. was different from this; because there the father was not indebted at the time of the settlement, as was the case in the present instance. The deed was before the marriage, and yet the wife is not made a party, which increases the difficulty of admitting that the marriage was the foundation of the conveyance. For there was nothing to protect the wife's interest, and the husband might have sold the estate before the marriage, so that she could not even have been endowed. The case in 1. *Eq: cas. ab.* 149 cannot be law, according to Mr. Marshall's construction; but perhaps it was only a mere abstract principle advanced by the court. These lands therefore, as well as the others, are liable to the creditors.

RANDOLPH in reply. The deed to Richard Randolph is good. For marriage is a favorite consideration in law; and when the grantor made the deed he supposed himself in affluence: To which I add that his will shews he possessed a very large estate still. It is no objection that an express estate is not given to the wife, by the deed; because it is all that Mr. Beverley demanded. Besides the right of dower, with the comforts resulting from the affluence of the husband, were real advantages to the wife; and the deed contains a restriction as to alienation, in case of no heirs, that looks as if the children were contemplated. In addition to which there was a real monied consideration. All which puts the motive for the deed beyond all question.

But then it is said, that the deed was not recorded within eight months from its original delivery; and that the re-acknowledgment only a-

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mounts to a confession, that he had originally delivered it, but does not operate as a new delivery. This however would be, to suppose that the parties meant a weak and absurd thing; and therefore no such presumption will be made; but it will be considered as a new delivery altogether.

It is said though that there cannot be a double delivery of the same deed. But no substantial reason is, or can be offered for the position; because there is nothing which prevents the grantee from giving up his deed, and the grantor from re-granting the estate to him. The doctrine from *Shepherd* and *Perkins* is not against us; because those authors proceed upon the idea of a re-delivery only. But there is a very material distinction, according to the opinion of Lord Mansfield in the case cited from *Cowp.* 204, between a mere re-delivery and a re-execution of the deed. In the present case, there was not only a re-delivery, but a re-attestation and re-execution also. For the time of the re-delivery is expressly noted on the deed, by the witnesses, in order to shew when the attestation and re-execution took place; so as to remove all doubt, that it was intended to operate as a new deed. Put the case that the old date in the deed had been erased and the new date inserted in its room, it would clearly have been good. But what was done, was essentially the same thing. Let us suppose a case which may and does very frequently happen, that all the witnesses do not attest at the same time: In that case, according to this doctrine about double delivery, the deed would not be well proved. But surely the court would not endure such a position. *Shepherd* puts three technical cases, which he probably took up from mistake; and one of the year books does not warrant his inference. A circumstance tending greatly to weaken his authority. Besides the doctrine was before the statute of enrollments, and no instance is produced since. If any circumstance prevents the grantee from having his deed recorded, he may file a bill in equity

equity and compel the grantor to make a new deed; which will be good against subsequent purchasers, and all creditors who had not made their claims effectual, before the institution of the suit. But if he may be compelled to re-execute, why may he not do it voluntarily?

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The case is peculiar to Virginia, and consequently the custom is very material. For it is a custom known to every body; and in practice every where. Such universal usage should therefore make the law; and in fact the question never was made before, but the practice considered, by all ranks of men, as founded in the law of the land. It is therefore like the case of the scroll instead of the seal, or that of omitting to indent, or many of the decisions of our courts upon the law concerning the office of executors and administrators: None of which have any better foundation perhaps, than the long established practice of the country; which the case, cited from *Rolls abridgment*, proves should give the rule in such cases. Besides it is remarkable that this practice was in use at the time of passing the law; and therefore the presumption is that the Legislature intended to conform to it.

There is no weight in the objection that the re-acknowledgment was before the expiration of the eight months; for it does not open any door to fraud as the opposite counsel supposes: Because that is more presumable in the case of a re-acknowledgment after the eight months have expired; whereas the other shews an honest intention, by making use of a timely precaution. In the present case, it was particularly so; 1. Because it was on the day the grantor made his will, and when he lay ill and feared he could not be got to court. 2. Because it was discovered that the witnesses could not be produced at court, within the eight months. So that there was a necessity for it from both causes; and consequently, there is not the least room to suspect a fraud. The cause therefore

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therefore stands in the same situation, as if the old deed had been destroyed, and a new one made in which case, as the title on the destruction of the old deed would have been in the grantor, he might unquestionably have regranted it by the new one to whomsoever he pleased.

That the marriage was prior to the re-acknowledgment makes no difference; because the old consideration, which was the motive to the deed, continued. Indeed, in support of the real justice of the case, the court would now permit it to be recorded *nunc pro tunc*. 1. *Wms.* 140. 2. *Vern.* 234, 564.

The deed to David Meade Randolph cannot be impeached. For there was an immediate communication between Thomas Mann Randolph, the father of the lady, and Richard Randolph, the father of the husband; in consequence of which the letter to David M. Randolph was written. So that the marriage was the positive, pointed consideration of the deed. It is not material that Thomas M. Randolph did not ask for any specific property; for he required a competent provision for the son, so as to enable him to maintain his daughter in comfort; and that was given.

Nor was the act fraudulent either upon intention, or upon the principles of law. Not upon intention; because at the time the grantor thought himself rich; and there is not a syllable of testimony to shew that the two fathers meditated any fraud. On the contrary it is not even shewn, that Thomas Mann Randolph knew of the declining circumstances of Richard Randolph. But suppose he had, it would not influence the question. For he would still have had a right to have insisted on a settlement: Indeed prudence would have the more strongly dictated it upon that account; and that, in fact, is very often the reason, why settlements are demanded. Therefore upon no legal principle can a fraud be inferred; but as the letter, which is expressly proved by the witnesses, demonstrates,

monstrates, most clearly, what was the true consideration of the deed, it will be received in support of it.

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The judgments do not constitute a lien upon any of the lands. For at common law judgments did not create a lien; and the *levari facias* does not prove any thing to the contrary; for that writ had other objects. The lien therefore was a mere consequence of the statute of Westminster which confined the *Elegit* to the Kings Courts; and therefore to courts of general jurisdiction, to our old General Court. So that a County Court judgment is not within the reason of the statute. Indeed any other construction would be intolerable: It would introduce inconveniences very great to be borne; and as there is no positive law which says that there shall be a lien created by such judgments, there can be no reason for abiding by a rule which was intended to apply to the judgments of Courts of another kind.

But it is said that the act of 1772 giving a general execution produces the same consequences.

This however is not correct in any case; and certainly not in this. For no application appears to have been made for executions, and the act clearly supposes that to be necessary. However, be it as it may, the neglect forfeited the right, if the plaintiffs, in the judgments, ever had any. For the judgments were suffered to expire, without any excuse being made for it; and therefore they ought not afterwards to affect the rights of third persons. *Gilb. l. Ex. 12.* is extremely applicable. For the case of a judgment in a real action is longer infinitely, than a judgment for debt; because in the former the land is specifically recovered, and therefore the purchaser more bound, in conscience, to enquire concerning it. The negligence in the present case has been gross; and therefore ought not to affect innocent purchasers who had no cause to suspect a lien; because it is contrary to natural justice that such negligence should

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should be encouraged, *Chan. cas.* 36. The case cited from *Vez.* contains a very just principle; and there can be no difference between real and personal property in that respect. For in both instances the delay was equally prejudicial; and therefore the rule as to one, will hold with regard to the other.

The case cited from *Bacons abridgment*, relative to taking an *Elegit, nunc pro tunc*, does not apply; because it is a mere fiction of law, which never is allowed to produce an injury to those who have acted fairly, if the others have no superior equity. The *scire facias* is only a substitute for the action of debt which was the common law proceeding, and as the lands would only have been bound from the last judgment in the action of debt, no more would they in a *scire facias*. If all County Court judgments are to bind, the impossibility of getting notice, will create a disability, which will clog all alienation.

Wayles' executors are not bond creditors; but if they were we have at least articles under seal for the property; and the court will not allow it to be taken from us, by those having no greater equity.

But at any rate the mortgagees have a clear equity whether the deed be good or not. For the purchase was from the heir, whom the plaintiff sue in that character. The mortgagees knew nothing of the debts, and therefore are purchasers without notice. So that as the law allows the heir to alien before action brought; and the mortgagees have fairly ventured their money on the estate, they ought not to be postponed to dormant claims in favor of negligent creditors. Therefore if the conveyance be considered as absolutely void, then the mortgagees have the title of the heir; and if it be considered as passing the estate, then like an alienation by a devisee, they will still be entitled, although Richard Randolph will be personally liable, for so much, to the creditors. These

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views of the subject are completely supported by the case cited from *Anstruthers reports*; and by 2. *Bac. abr.* 607. (a) 1. *Eq. cas. ab.* 105.

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*Cur. ado. vult.*

**PENDLETON** President. (After stating the case, and mentioning that the Court were unanimous as to their judgment and the principles on which it was founded.) Delivered the resolution of the Court as follows:

We lay down this general proposition, that where a creditor takes no specific security from his debtor, he trusts him upon the general credit of his property, and a confidence that he will not diminish it to his prejudice. He has therefore a claim upon all that property, whilst it remains in the hands of the debtor; and may pursue it into the possession of a mere volunteer; but, not having restrained the debtors power of alienation, if he or his volunteer convey to fair purchasers, they, having the law and equal equity, will be protected against the creditors.

We then proceed to consider whether the sons Richard and David were such purchasers for a valuable consideration?

#### 1. As to Richard.

There can be no objection to his consideration; It is natural affection, marriage, and money paid. But the objection is, that the deed was not recorded within eight months from the sealing and delivery thereof; and therefore, by the express words of the act of Assembly, is void as to creditors. If the fact be so, the operation of the law is positive, since it comprehends all creditors; although in reason, the recording would seem to affect only mesne creditors, between the date and recording.

We consider this deed to have been sealed and delivered on the 21st of March 1786, and that

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the recording, within four months afterwards, complied strictly with the law. The term *re-acknowledgment* seems to have produced, in the mind of the Chancellor, mistaken ideas. He understands it as meaning no more, than that Richard, the father, on the 21st of March, acknowledged that he had, on the 20th, of September before, sealed and delivered that deed. A mistake, which information from our clerk would correct. It would be, that when a man comes into Court to acknowledge a deed, the question put to him is not, whether, he delivered the deed at the date? but whether, he then acknowledges the indenture to be his act and deed? So the oath to the witnesses is, that they saw the bargainor seal and deliver the paper as his act and deed. Such was the oath administered to Currie and the other witnesses to this deed. When did they see it sealed and delivered? Not on the 20th of September 1785; (for then they were not present, and other witnesses attested that delivery;) but on the 21st of March when they subscribed it, noting, upon the paper, the day of the delivery which they attested.

It is admitted, by the Chancellor, that if this deed had been cancelled and a new one made, it would have been good. This the council also admit; but pursuing the Chancellors idea, they have produced a number of cases, some stating that, between the date and recording, the estate is in the bargainor; others that it is in the bargainee; and others still, that it is in suspense.

Leaving it to others to reconcile this clashing jargon, we consider what would be the opinion of a plain man on the occasion? It would be, that the estate was in the bargainee whilst he held the deed, which was the evidence of it; but, when he surrendered that deed to the bargainor, his legal title ceased, and the other was at liberty to convey to him, or any other: And if to him, might either destroy that deed and make a new one,

one, or, by a re-execution of the same paper, give it force, as a new deed from that period.

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Randolph.

The reason mentioned for such re-execution, to increase the number of witnesses, applies in this case, and repels a suspicion of fraud. The deed was to be recorded in Richmond, where all the courts were held for its admission; the eight months were near expiring, and only three witnesses to the deed; two of which resided at a considerable distance, and might not be had in time, the eight months being nearly run out.

What difference can it possibly make, between a new deed and the old one re-executed? Mr. Wickham stated two; in both of which the old deed is best,

First, he justly complained of the practice of renewing deeds from time to time, and keeping them secret; by which means, creditors and purchasers may be deceived, and against which Chancery will relieve as a fraud. But this will apply equally with respect to both cases; with this difference, that in case of new deeds each time, it might be difficult to prove the renewals; whereas the old deeds re-executed shew the progress from the first date and is more beneficial to the creditors,

The same observation applies to his other case. That of a mesne purchaser from the bargainee; since the renewed deed would shew an existing title, at the time of his purchase.

Upon the whole we are of opinion, that the deed is to be considered, to every intent and purpose, as a deed of the 21st of March 1786 and not before; that it was, therefore recorded, in due time; and that Richard is to be considered as a purchaser for a valuable consideration.

## 2. As to David;

Being at liberty to aver and prove the real consideration, he has satisfactorily proved the deeds



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to have been in consequence of a marriage agreement between the fathers of himself and his lady; and he is to be considered as a purchaser for a valuable consideration also:

It therefore only remains to enquire, whether at the time of their purchase, there was such a lien upon the land, by the judgments, as restrained the alienation of Richard the elder?

Hanbury's judgments are the great subject of controversy. They were entered in July 1770, when an *elegit* could not issue upon them, into any other county than York; and therefore in reason and justice could only bind the lands in that county: And this is not contradicted by authority shewing, that judgments in England, entered in the Courts of General Jurisdiction over the whole nation, bind the lands throughout.

The act of 1772, however, changed the principle, and by permitting the *elegit* to run into other counties, is supposed at present, but not decided, to extend the lien to all the lands in the country; and that Hanbury had a right, in July 1772, (that being the last day to which the executions were to be staid,) to sue out an *elegit*, on those judgments, into any other county.

We are then to enquire, what he was to do, in order to preserve his lien?

He was either to issue his *elegit* within a year, which expired in July 1773, or to enter upon the roll in England, or in the record book here, that he elected to charge the goods and half the lands, which would be equal to issuing the *elegit*. If he did neither, he might, on motion, be allowed to enter the election *nunc pro tunc*; but, in the latter case, if there had been an intervening purchaser, the motion would have been denied, upon the principles of relation: Which being a legal fiction, contrived to support justice, is never to be admitted to do an injury to a third person.

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But the creditor here has taken no steps; he has sued out no execution; has made no election upon record. The judgments have long since expired; and no *scire facias* taken out to renew them. If he had done so, the *lien* would have been revived; but to operate prospectively, and not to have a retrospective effect, so as to avoid mesne alienations.

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So that we can with great propriety, say, in the language of Chief Baron Gilbert, that these judgments *over-reached nothing*; and did not prevent the fair purchases of the sons in 1780 and 1786, unless the causes, assigned in the replication, should be a sufficient excuse for the delay.

Presuming that if this constructive notice from dormant judgments will bind a purchaser at all (contrary to what is said in 3. Bac. 645 and 646, that express notice is necessary,) it ought to be taken strictly and not extended by equity, we proceed to enquire into the facts.

From July 1772 to April 1774, there is no excuse. This is 21 months, during which the judgments expired and the *lien* was at an end: if it could be revived by a *scire facias* on the judgment which has never been issued.

Admitting his excuses to be good, from April 1774 to 1791, they ceased to operate from the latter period. At that time, if he had sued out his *scire facias*, there were lands in the hands of the devisees, which he might have charged in exoneration of the purchases. But by lying by, until 1797, he suffered them to be exhausted, by other creditors, by bond (for the proceedings against them are all subsequent to 1791;) and now comes into equity to set up his *lien* against purchasers. This appears, to me, to be contrary to every principle of law and equity.

The other judgment creditors are liable to the same objection, of not having kept their *liens* alive, by the means before stated.

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The decree of the Chancellor ought therefore to be reversed, so far as it concerns the conveyance to Richard Randolph the son, and he and those claiming under him are to hold the estate according to the deed; But the decree is to be affirmed as to the residue; with this reservation, as to the claim of Wayles's executors, that they are to be considered as bond creditors, standing in the place of Bevins, so far as may affect the distribution of assets remaining; but not so, as to charge the executors with a *devastavit*, on account of payments, or judgments to simple contract creditors.

The decree was as follows:

“ The court is of opinion, that the deed, from  
 “ Richard Randolph the elder to Richard the  
 “ younger, was made upon good and valuable con-  
 “ sideration, and was binding upon the creditors  
 “ of the father, having been duly recorded within  
 “ eight months from the twenty first day of March  
 “ 1786; when the said deed was re-executed by  
 “ sealing and delivery and attested by new sub-  
 “ scribing witnesses, and ought to be considered,  
 “ to every intent and purpose, as a new deed of  
 “ that date. That, although, the deeds for Da-  
 “ vid Meade Randolph expressed the considerati-  
 “ ons to be for natural affection and advancement  
 “ in life, he was, nevertheless, at liberty to  
 “ aver and prove an additional consideration; and  
 “ having established, by satisfactory proof, that  
 “ the said deeds were made in consequence of a  
 “ treaty of marriage between the fathers of him  
 “ and his lady, he is to be considered as a *bona*  
 “ *fide* purchaser of the estates. That the said pur-  
 “ chasers are not to be affected by the supposed  
 “ lien upon the lands from the judgments in the  
 “ proceedings mentioned, such lien not existing  
 “ at the time of their respective purchases, for the  
 “ reasons stated in the decree of the said High  
 “ Court of Chancery. That the appellees, exe-  
 “ cutors of John Wayles, ought to stand in the  
 “ place

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"place of James Bevins, and be considered as  
 "bond creditors, so far as may affect the distribu-  
 "tion of remaining assets; but not so as to charge  
 "the executors with a *devastavit* on account of  
 "payments or judgments to simple contract credi-  
 "tors; and that there is error in so much of the de-  
 "cree aforesaid as declares the deed to Richard  
 "Randolph the son void as to creditors, and directs  
 "a sale of the lands by commissioners, and the ap-  
 "plication of the money to the benefit of the ap-  
 "pellees, and as to so much as subjects the money for  
 "which the land called Elams \* devised by Rich-  
 "ard Randolph the father to his son David Meade  
 "Randolph hath been sold by him, to the pay-  
 "ment of the demand of the appellees, the court  
 "being of opinion, that the money, for which the  
 "said land was sold, is only liable to the demand  
 "of the appellees, if it has not already been ap-  
 "plied to the payment of debts which bound the  
 "devisee. Therefore it is decreed and ordered,  
 "that so much of the said decree as is herein stat-  
 "ed to be erroneous be reversed and annulled,  
 "that the bill be dismissed as to the appellants;  
 "that the residue of the said decree be affirmed,  
 "with the reservation herein before stated, as to  
 "the executors of John Wayles; and that the appel-  
 "lees pay to the appellants the costs expended in  
 "the prosecution of the appeal aforesaid here."

In the suit of *Beverley vs Eppes* the decree was  
 as follows.

The

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\* The decree of the Court of Chancery as to this part of  
 the case was in the following words. "The money for which  
 "the land called *Elams*, which was devised by Richard Ran-  
 "dolph the father to his son David Meade Randolph, hath  
 "been sold by him, is liable to the plaintiffs demands."

And the devise to David Meade Randolph was in the fol-  
 lowing words, "I give to my son David Meade Randolph  
 "and to his heirs forever, my tract of land called *Elams*,  
 "in the county of Chesterfield, containing by estimation one  
 "hundred and thirty acres."

Expet &c.

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Randolph.

"The court is of opinion that the said decree is erroneous. Therefore it is decreed and ordered that the same be reversed &c. and this court proceeding to make such decree as the said High Court of Chancery ought to have pronounced. It is further decreed and ordered that the deed from Richard Randolph the father to Richard Randolph the son, mentioned in the proceedings, be established. And the cause is referred to the said High Court of Chancery, for the appellants to proceed further therein for the compensation prayed in their bill, if they shall think proper."

## TALIAFERRO

against

MINOR.

Receipts and payments by an administrator ought not to be reduced to specie by the legal scale of depreciation; but should be stated in paper money.

The act of Assembly declares that all actual payments made in paper money in discharge of debts or contracts should stand at their nominal amount without being scal-

THIS was an appeal from a decree of the High Court of Chancery, where William Minor and Mildred his wife, and Lawrence Washington executor and Griffin Stith and Frances his wife, executrix of Thornton Washington deceased, brought a bill stating, that John Thornton died intestate in 1777, and that his personal estate devolved on his daughters Mary, the wife of Woodford, Betty the wife of Taliaferro, on Thornton Washington his grandson, and his granddaughter Mildred the plaintiff. That Taliaferro and Woodford took administration on the estate; and that the plaintiffs William and Mildred have intermarried. The bill therefore prays an account and distribution of the personal estate, and for general relief.

The

ed; nor are such payments within the proviso empowering the courts to vary the scale upon equitable circumstances.

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The answer of Taliaferro states, that many of the debts due the decedent were paid in paper money. That all the personal estate was sold by the administrators, amounting, with a crop, to £13848:4:3½. That £4739:13:4 came to the hands of the defendant; who received also sundry debts of the intestate to the amount of £400. That, out of the monies received for the sales of the estate and on other accounts, several debts due from the intestate have been paid. That in July 1779 there was paid to John Lewis father of the plaintiff Mildred the sum of £4111:9:7, and to Thornton Washington, by a written order from his father, the sum of £4200:18:0; which were the amount of their shares after the proper deductions were made; and for these sums he took receipts from the said John Lewis and Thornton Washington. That the said Thornton Washington and the said John Lewis father of the plaintiff Mildred were present at the sales of the personal estate, and purchased several articles respectively. That the defendant has been sued for a considerable debt claimed of the said John Thornton; which suit is yet depending. That after Woodford went into the army, the administration was conducted by the defendant.

The answer of Woodford's executrix, speaks of the sales of the estate, and that, after Woodford went into the army, the administration was conducted by Taliaferro.

The Court of Chancery referred the accounts to a commissioner; who credited the estate with the money for the sales of the personal estate, upon the days when the sales respectively took place; which were on the 19th, of May 1778, the 1st, of December 1778, and the 2d, of January 1779. He also credited the estate, on the 5th, of June 1779, with four loan office certificates paid to John Lewis, for his daughter Mildred the plaintiff, viz. One of 300 dollars, dated 5th of March 1777, with interest to the 5th of June, aforesaid, when

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when it was paid to Lewis, as above mentioned; a second of 1800 dollars, dated 17th of March 1778, with interest as above; a third of 2333 $\frac{1}{3}$  dollars, dated 1st of March 1778, with interest as above; and a fourth of 1500 dollars, dated 6th of November 1778, with interest as above. He also credited the estate, at the same time, with £ 1347:12 continental certificates for emissions of April and May paper money, to which no date being affixed, the date of payment to Lewis was assumed. He also on the 5th of July 1779, credits the estate with a loan office certificate of 4333 $\frac{1}{3}$  dollars dated 5th of December 1777, with interest to the said 5th of July; when it was paid to Thornton Washington. He likewise credits the estate with monies collected. After which he debits the estate with sundry disbursements; but leaving due from John Taliaferro, as administrator of John Thornton deceased, a balance of £ 158:9:2 to the estate of Thornton Washington; and of £ 361:18:7 $\frac{1}{4}$  to the estate of Woodford the other administrator.

In this report the commissioner, being uncertain whether the monies paid Thornton Washington by William Woodford were included in any of the payments made by John Taliaferro, considered the separate receipts as separate and distinct payments. He added, that as the payments of the 5th of July 1779 were included in one receipt, without specifying the particulars, except the certificate, the purchases at the sales with the certificate and as much paper money as made up the £ 3800 were taken together for Thornton Washingtons share, and that as the sales were all made for ready money, and few debts to pay, two and a half per cent commission, only, were allowed the defendant.

The defendant John Taliaferro excepted to the report, for the following reasons, amongst others.  
1. That the certificates for the emissions of paper money in April and May 1778, being for paper

money

money received at the sales of the estate and funded ought to be considered as part of the sales; and therefore as the whole amount of the sales was credited, the said certificates ought not to be made a separate charge again; for by that means the defendant was twice charged with the same thing. But if the certificates had been a proper charge the depreciation ought to be calculated from the time the certificates were received by him, and not from the time they were paid to Lewis. 2. That the commissioner in charging the disbursements and payments by the defendant, had made him liable for the depreciation, between the dates of the receipts and those of the payments; whereas if the scale was to be applied at all the defendant ought not to be answerable for the loss arising from the intervening depreciation: But that according to the act of Assembly all payments in paper money ought to stand at their nominal amount. 3. That  $2\frac{1}{4}$  per cent was not a sufficient commission for his administration on the estate.

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On these exceptions the commissioner remarked that the certificate for the April and May money could not be included in the sales already made, because it is credited by the defendant over and above the sales of the estate. So that the only question is whether the value is rightly ascertained? To which there could be no objection; because the defendant is not made answerable for more, on that ground, than he has credit for in the accounts of Minor and Washington. In which the *debts* of the certificates, with interest in their accounts, correspond with the credit to the estate in the account current; upon which statement of the certificates, he observed the defendant's exception vanished; because he paid the same value that he received. That as to the exception concerning the disbursements, and payments made by the defendant he thought himself warranted under the decretal order of the court to do the parties material and complete justice as far as their respective cases would admit; and that the act of Assembly did not prevent a fair adjustment,

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of the accounts of executors, administrators, guardians, or other, trustees. That the act directs, "that debts and contracts, are to be reduced to "the true value in specie at the days or times the "same were incurred or entered into. A, buys a "horse of B. for two hundred pounds in January "1778 payable January 1779, but he fails to pay- "for him until January 1782, when paper money "ceased to be a circulating medium: When the "contract was entered into, the scale was four "for one, and therefor A, must owe to B, £ 50 "with £ 7 : 10 for three years interest thereon "making the sum of £ 57 : 10; whereas if the "term *incurred* is applied to the debt at the day "of payment, when the scale was eight for one, "he will only have to pay half that sum. That "the last is not the sense, in which the Legisla- "ture used the term *incurred*, appears clearly "from the proviso in the second section of "the act; where it is provided, that actual pay- "ments made in the then current paper currency "should not be scaled. The injustice done to the "debtor, by scaling the debtor contract at the "time it was incurred or entered into, and not at "the date of payment, is here transferred to the "creditor, with accumulated force. And altho' "the debtor under the terms of the act in the case "propounded, would pay double, yet, if he paid "the creditor with interest on the last day of De- "cember 1781, to wit, two hundred and thirty "pounds reduced by the scale of one thousand for "one making four shillings and seven pence, he "would pay him with about the two hundred and "fiftieth part of his debt. The last clause of the "act proves, that the Assembly foresaw that gross "injustice would be done by a rigid adherence to "the scale, or to the payments made by debtors "and therefore a discretionary power was vested "in the courts. Under this opinion your commis- "sioner has, in every instance referred to him by "the Court, endeavored to do justice to both debt- "ors and creditors. In some cases where the "credits to an estate arose from sales on credit,

" and

"and the collections of debts due to the testator  
 "or intestate, which are not always punctually  
 "paid, he hath reduced the paper money credits  
 "by a medium scale, and used the same rule for  
 "disbursements. In others where the sales were  
 "made for ready money and no debts to collect,  
 "and few or no demands to satisfy but the claims  
 "of distributees, he hath applied the scale accord-  
 "ing to the dates. This last rule was applied to  
 "the case under consideration, it appearing to  
 "your commissioner that the administrator had no  
 "debts of any consequence to pay, which could  
 "retard the distribution."

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"That the whole of the disbursements were of  
 "such a nature as made them necessarily known  
 "to the defendant, and it was therefore his duty  
 "to have paid them directly, as he had money on  
 "hand for that purpose."

The Court of Chancery overruled the exceptions, and decreed payment of the £ 158 : 9 : 2 to the estate of Washington, and of the £ 361 : 18 : 7½ to Woodford, with interest on each sum from the 5th day of July 1779.

From which decree Taliaferro appealed to this court.

RANDOLPH for the appellant. *Sallee vs Yates* \* and *Granberry vs Granberry* † contain the general doctrines of the court upon paper money, which ought to influence this case; and prove that the appellant ought only to be charged according to the scale value, as that was the real value of the subject in his hands. For there was no default in him, and he was ready to pay the shares of the other distributees when demanded.

MARSHALL *contra*. Relied on the reasoning of the commissioner upon the subject; and added that

as

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\* 1. Wash. 226.

† 1. Wash. 246.

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as the money was not retained for payment of debts, that the appellants might have paid it over to the guardians of the infants at an earlier period.

RANDOLPH in reply. It does not appear that the guardians ever demanded it.

*Cur: adv: vult:*

*Per: Cur:*

“ The court is of opinion that the receipts and  
“ payments of the administrator to the end of the  
“ year 1779 ought not to have been reduced to  
“ specie, by the legal scale of depreciation, but  
“ to have been stated in paper, in which the re-  
“ ceipts and payments were. The reasoning of  
“ the master commissioner, on the subject, tends  
“ to illustrate some of the evil effects of paper; but  
“ it belonged to the Legislature, and not to the  
“ Courts of Justice, to fix the mode of winding up  
“ that unhappy affair, so as to subject individuals,  
“ on the whole, to the least of unavoidable evils.  
“ Which was done by the act of 1781: Amongst  
“ other regulations, it is declared that all actual  
“ payments, made in paper in discharge of debts  
“ or contracts, should stand at their nominal  
“ amount and not be scaled: Nor is the case of  
“ such payments within the proviso empowering  
“ the courts to vary the scale upon equitable cir-  
“ cumstances. Perhaps the conduct of this admin-  
“ istrator is less exceptionable, than almost any  
“ which hath been brought before a court; since,  
“ in the next year after the intestates death, he  
“ paid the two complaining distributees all, near-  
“ ly all, or probably over, their proportions of  
“ the estate to that period. The account ought  
“ to be stated in paper to the time of the last pay-  
“ ment to them, and the balance, either way, re-  
“ duced by the scale of that month, carried to the  
“ account of subsequent specie articles, and inte-  
“ rest allowed against the debtor from time to time  
“ thereafter. The court is further of opinion the

“ administrator

" administrator ought to be allowed five per cent  
 " commissions on the amount of the sales and debts  
 " received by himself (but not on the loan office  
 " certificates or debts collected by Day, who prob-  
 " ably retained a commission;) that allowance  
 " not being too great for selling and receiving,  
 " paying and accounting for the money, and risque-  
 " ing the receipt of counterfeit paper; an in-  
 " stance of which appears to have happened to his  
 " loss. Amongst the loan certificates is a con-  
 " tinental one for one thousand three hundred and  
 " forty seven pounds twelve shillings emissions of  
 " April and May money 1778, which the admi-  
 " nistrator is charged with, because it is part of  
 " four thousand seven hundred and thirty nine  
 " pounds, thirteen shillings and four pence credit-  
 " ed in his account for the certificates, besides a  
 " credit for the amount of the whole sales: This  
 " he states in his exceptions to have been a mis-  
 " take as to the certificates in question; which  
 " were taken for paper money received for the  
 " sales and funded by him; and so a double charge.  
 " Which, tho' not proved, is very probable; since  
 " the certificates, being after the intestates death,  
 " must have been for paper found in the house or  
 " received by the administrator for sales or debts:  
 " Of the former eighty pounds six shillings and six  
 " pence is accounted for, which it is presumed  
 " was all. It is remarkable that a like mistake  
 " was made by the administrator in the case of  
 " Armithead's certificates which was corrected by  
 " the commissioner. This article, therefore, of  
 " one thousand three hundred and forty seven  
 " pounds twelve shillings ought to be open for  
 " enquiry and adjutment on taking the new ac-  
 " count. The decree in favour of the represen-  
 " tatives of William Woodford the co-administra-  
 " tor seems improper, since no contest, between  
 " them and the appellee, appears in the record,  
 " nor any account of their separate transactions;  
 " except in the state of the accounts by the com-  
 " missioner; unless that was done by consent,

" which

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" which would justify it. And that the decret  
" aforesaid is erroneous. Therefore it is decreed  
" and ordered that the same be reversed and an-  
" nulled; and that the appellees pay to the appel-  
" lant his costs by him expended in the prosecu-  
" tion of his appeal aforesaid here; and the cause  
" is remanded to the said High Court of Chance-  
" ry, for that court to have the account, between  
" the parties, reformed; and a decree entered,  
" according to the principles of this decree."

## ANDERSON

*against*

## ANDERSON.

The power of the court of chancery, over an appeal to this court, ceases on the first day of the next term, after the decree was pronounced.

And therefore if security be given in the vacation that court cannot disallow the appeal because the appellant does not give other security.


Marriage settlement must be recorded, within eight months, or it will be void against prior creditors.

**T**HIS was an appeal from a decree of the High Court of Chancery, in a suit brought by Jane Anderson by her next friend against George Anderson and others. The bill states that the plaintiff, before her marriage with George Anderson, was entitled to the remainder in certain slaves after the death of her mother Rebecca Tucker. That, in the year 1787, she agreed to marry the said George Anderson, who was at the time indebted beyond his fortune; but that circumstance was unknown to the plaintiff. That her friends thinking it advisable, a marriage contract, to secure her property from his creditors, was agreed upon; and the friends of the plaintiff recommended, that Colonel George Nicholas, an eminent practitioner of the law, should draw it: to which the said George Anderson objected, because he said his brother, who was a lawyer, would draw it without expence. This, the plaintiff and her friends, who confided in the said George, could not refuse; and, accordingly, he was requested to get his brother to draw proper articles, for securing the property. That,

a short time before the marriage, the said George produced a paper, which he said was such an one as would answer the intended purpose; but the plaintiffs friends were not satisfied, and an addition was made: which they (who were ignorant of law, and no counsel could be had) supposed to be sufficient. That the marriage afterwards took effect; and the plaintiff has since discovered, that the debts of the said George, contracted *before marriage*, are more than sufficient to swallow up the whole estate. That the marriage contract has been supposed insufficient to protect the property *from former creditors* and that the brother of the said George has since declared he intended it should be insufficient, *the creditors being chiefly his relations*. That the creditors have taken the slaves in execution; although they did not trust him on the faith of the same. That the intention of the plaintiff and her friends was to secure the property to herself and children. The bill therefore prays that the said George and his creditors may be made defendants; that the creditors may be enjoined; that the slaves may be settled agreeable to the marriage contract; and that the plaintiff may have general relief,

The answer of George Anderson admits the plaintiffs right to the remainder in the slaves; That the marriage contract was proposed in order to protect the property from the creditors of the defendant; and that Colonel Nicholas should draw it. That the defendant objected and proposed his brother should draw it; but that this was not done with any improper motive. That he applied to his brother, and requested him to draw the contract according to the agreement with the plaintiff and her friends. That his brother drew a writing, which he delivered to the defendant as sufficient; but Colonel Coles with whom the plaintiff then lived, after shewing it to the plaintiff and her mother, objected to its sufficiency; and thereupon the addition was made. That he be-

tives,

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tives, but this was not known or suspected by the defendant until after the marriage.

The creditors say they know nothing of the fraud, if there was any.

The depositions prove that the debts existed prior to the marriage, that a marriage contract was stipulated for; and Anderson's brother says he wrote one. That he considered it immaterial at the time, in what manner it was drawn, as the said George informed him it was only to satisfy the plaintiff's mother, and that it would be destroyed afterwards.

The marriage contract is in the words following, " This indenture made the 24th of March  
 " 1787, between George Anderson of the city of  
 " Richmond of the one part, and Jane Tucker of  
 " the county of Albemarle and parish of St. Ann  
 " of the other part witnesseth, that whereas a  
 " marriage is about to be solemnized between the  
 " said parties, and for the greater ease, satisfaction  
 " and assurance of the said Jane, the said George  
 " doth hereby agree on his part that in case he  
 " should have no issue on the body of the said  
 " Jane and in case the said Jane should survive  
 " the said George that then and in that case the  
 " said George doth agree to relinquish and announce  
 " all claims and demand to all the slaves now in  
 " possession of the said Jane or all the slaves that  
 " are now her property, that may accrue to him  
 " the said George by the union aforesaid, and by  
 " the laws of the land, and the said George doth  
 " further agree that in case he should leave no  
 " issue by the said Jane and in case she should sur-  
 " vive him, that then and in that case, the said Jane  
 " may dispose of by will, deed or any other con-  
 " veyance, whatever all the slaves now in her pos-  
 " session with their future increase or that are now  
 " her property to any person or persons as she  
 " may think fit. In witness whereof I have here-

" unto

"unto set my hand and affixed my seal the day and  
" year above written.

Anderson  
us  
Anderson

GEORGE ANDERSON.

*Signed sealed and deliver-  
ed in the presence of*

JOHN COLES.

" It is also agreed by the said George Anderson  
" that none of the slaves above mentioned or that  
" may accrue to him by the union before named  
" or their future increase shall be given to any  
" other than the issue of the said Jane, or shall  
" they or any of them be sold on any account  
" whatever, without the consent of the said Jane.

GEORGE ANDERSON."

JOHN COLES.

At Albemarle September Court 1788 it was  
acknowledged by George Anderson and ordered  
to be recorded; and at Albemarle May Court  
1791, it was proved by John Coles the witness  
thereto.

The Court of Chancery on the 5th of June 1794  
dismissed the bill; and the plaintiff prayed an ap-  
peal to this Court, which was allowed on her giv-  
ing bond within two months. This she failed to  
do; and afterwards, that is to say on the 26th of  
August 1794, petitioned the Chancellor out of  
court to be allowed to give bond and prosecute  
the appeal, as she had been prevented by accident  
from giving it before; The Chancellor allowed  
the petition, and the plaintiff gave bond; but at  
the September term following the Court of Chan-  
cery set aside the allowance of the appeal, unless  
the plaintiff by the 26th of that month, gave such  
security as should be approved of by the Court.  
In March 1797, the plaintiff having failed to give  
the last mentioned security, the Court of Chan-  
cery allowed her to give bond within two months,  
if the Court of Appeals should be of opinion that

B. 2.

the



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the Court of Chancery then had power to grant the appeal.

RANDOLPH for the appellant. Made two points.  
1. That the appeal was regularly depending in this court. 2. That the fraud would protect the estate for the benefit of the plaintiff.

As to the first;

After the appeal had once been allowed, the Court of Chancery had no further controul over it; and the situation of the appellant will induce the court, who are not confined to any limited time for allowing the security, to extend the period farther in this, than ordinary cases.

As to the second:

If George Anderson only were concerned, there could be no question about it; for it is clear that relief would be given: But his creditors ought not to be in a better situation than himself, as they can only have the same rights which he has. Nor will the failure to record, within the eight months, help their case; because it was owing to George Anderson himself, whose neglect was a fraud, which ought not to injure the rights of the wife.

WICKHAM *contra*. The act of Assembly is express, that the deed not having been recorded within the eight months, is void against the creditors. So that it is as if there had been no settlement: But if there had been none, then the law would have vested the property in the wife; and as the deed was not recorded, the presumption was that it had vested by the intermarriage. The alledged fraud can make no difference. For if one man gets possession of anothers estate, and sells to a third person, without notice, it is good: And the case, in effect, is the same here. It makes no difference whether the debts originated before or after the marriage; for, as the settlement was not recorded within the eight months, the act would equally affect them in either case.

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**WARDEN** on the same side. The settlement is extremely defective. For proper trusts and limitations to preserve the estate are not inserted: And upon that ground also the creditors must prevail.

**MARSHALL** on the same side. If any fraud has been committed, the creditors were not concerned in it; and therefore it cannot be objected against them. It is no objection to say, that they did not trust Anderson upon the credit of this property; for the act includes them, nevertheless, as it renders the deed void against all creditors. In which respect the act makes a difference between creditors and purchasers. Of course, if the creditors have been guilty of no fraud, it follows that the settlement cannot operate against them; but they have the same rights which they would have had, if the settlement had not been made.

**RANDOLPH** in reply. Recording the deed in September 1788 was sufficient by relation. That is the principle with regard to the enrollment of deeds of bargain and sale in England. By the act of 1785, for regulating conveyances, property, moving from the covenantor only, is contemplated; and therefore that law does not apply to the present case; where the property belonged to the wife. For the covenants here are all on the part of the husband. The word *creditors* in the act is to be understood with an exception of the wife's interest. It is used more strongly in the statute of *Elizabeth*, than in our act; and yet it has always been taken there in a sense according to the rule in the Bankrupt laws, which excepts the rights of the wife, although the terms in those laws are stronger than the words of our act. 1. *Ask.* 190. 2. *Ask.* 562. 3. *Ask.* 399. It was the culpable neglect of the husband, to whom it was confided, that prevented the deed from being recorded within the eight months; and that was a fraud, which will take the case out of the operation of the statute. For the court will supply the

omission

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omission to record. 2. *Vern.* 564. George Anderson was a trustee for his wife; whose interest was prevented, by the contract, from vesting in him; and therefore his creditors can have no right. 2. *Vez.* 665: He could not, by any act of his, bar her equity. 4. *Bro. Ch. cas.* 326. 1. *Wms.* 459. Of course, as the creditors attempt to charge the estate merely by the operation of law, it is competent to the wife to rebut that operation, by shewing the fraud and its effects in preventing the proper steps from being taken for her security.

**WICKHAM.** As the deed was not recorded the creditors relied, that this was the property of George Anderson, and gave faith to it accordingly. So that, if he be a trustee for the wife, still, the deed, not having been recorded, is void against the creditors; for whether trustee or not, it will make no difference in that respect, as he has the legal estate in him, and the deed is void by the act of Assembly. The arguments drawn from the statute of Elizabeth are irrelevant; because here was no intention to defraud. But if there was, and the creditors were not concerned in it, they would not be affected by it. There is no foundation for the distinction taken between the property of the wife and that of the husband; for settlements are more frequently made of the property of the wife, than of that of the husband; and the construction contended for on the other side would repeal the law. As the deed contained no settlement of lands, recording it in Albemarle Court would not have been sufficient; for that is expressly against the words of the act of Assembly.

**RANDOLPH.** The deed was executed in Albemarle county; and therefore that was the proper court to record it in.

*Cur. adv. vult.*

**LYONS** Judge, after stating the case, delivered the resolution of the Court as follows.

The

The first question is, whether the appeal is properly brought up?

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We are of opinion, that the power of the Court of Chancery ceased on the 10th of September 1794; when the next term after the making of the decree commenced; and, from that period, that it belonged to this Court only to determine on the sufficiency of the security; as the cause was then here, and the Court of Chancery had no longer any controul over it. For the authority of that Court, according to the true construction of the act of Assembly, expired with the vacation, which followed the decree; and therefore its subsequent proceedings were altogether void. Of course the appeal having been granted in August 1794, and security given according to law, it must stand.

The next question is, whether a Court of Equity can supply the omission and defect in not recording the marriage articles, within eight months, according to the act of Assembly for regulating conveyances?

Chancellors in England have gone great lengths in supplying defects in conveyances, as appears from the case of *Taylor vs Wheeler* 2. Vern. 564, and other cases cited at the bar; but we do not know what provisions or reservations there might have been in the act of Parliament or custom referred to in those cases, or in the bankrupt laws of that country alluded to in the argument.

The act of Assembly, for regulating conveyances in this state, was made to protect creditors and purchasers against secret trusts and latent titles; and for that purpose only: Since it contains a proviso, that the deed, although not proved within eight months, shall be binding between the parties, as it was at common law; and the proviso is an exception which proves the rule, that is to say, that the deed shall not bind any but the parties themselves.

But

Anderbon  
 vs  
 Anderson.  
 {

But when a statute says expressly, that a conveyance shall not bind, can a Court of Equity say that it shall? Surely that would be to repeal the act; and therefore equity will not interpose in such cases, notwithstanding accident or unavoidable necessity. For the power of a statute is so great that it has been said, that even infants would have been bound by the act of limitations, if there had been no exception with regard to them, contained in the statute itself.

It is true that there are no negative words, in the act of Assembly, to exclude the jurisdiction of the Court of Equity in the present case. But a Court of Equity must consult the intention of the Legislature as well as Courts of Law; and when the Legislature have determined a matter with its circumstances, a Court of Equity cannot intermeddle or relieve against the express provisions of the statute.

Fraud, however, is still left open for a Court of Equity to act upon; and if a creditor or purchaser has been guilty of a fraud, by preventing the deed from being recorded, or otherwise, Equity may still relieve; as no person ought to take advantage of his own fraud and obtain the benefit of the statute by undue means. For the act was intended only to secure fair and honest creditors and purchasers; and not to protect the fraud and circumvention of either of them.

But as the appellees, in this case, do not appear to have been parties or privies to any fraud, nor are even charged with it in the bill, they certainly are entitled to the full benefit of the act for securing their just debts; and the marriage agreement cannot now be set up in equity to defeat them: Especially as no excuse, for keeping up the marriage articles so long, is even alledged; if any could be admitted.

Rebecca Tucker does not shew any title to the slaves she claims; and, if she has any, she may recover at law.

The

the other questions made are not now necessary to be determined: and therefore they are repeated for future discussion.

**Anderfon**  
*vs.*  
**Anderfon,**

The decree of the Court of Chancery is to be med,

CASES

C A S E S  
ARGUED AND DETERMINED  
IN THE  
COURT of APPEALS  
IN  
APRIL TERM OF THE YEAR 1800.

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G U E R R A N T

*against*

TAYLOE.

If there be judgment against a sheriff, for the amount of money levied on an execution with the 15 per cent interest and he appeals. The appellee, by waiving the 10 per cent damages for retarding the execution and taking a simple affirmance of the judgment, may still have his 15 per cent damages, according to the judgment of the Court below.

**T**HE appellant was sheriff of the county of Goochland, and had levied the amount of an execution, which had been put into his hands by the appellee; but had failed to pay over the money. Upon which the appellee moved for and obtained judgment in the District Court, for the amount of the money levied with the 15 per cent damages. From which judgment the appellant appealed to this court.

**WICKHAM** for the appellee. After observing that there was no error in the judgment, said that the appellee was entitled to the 15 per cent damages, notwithstanding the act of Assembly which gives 10 per cent damages only in case of appeals. That this case of the sheriff was an exception to the general rule; for the sheriff would otherwise be a gainer instead of a loser by the appeal; because by delaying the execution of the judgment he lessened the interest. At any rate the appellee may relinquish the damages in this court, and take a simple affirmance of the judgment without the 10 per cent damages, and then by the terms of

of the judgment which is strictly conformable to the directions of the act of Assembly, the appellee will be entitled to the 15 per cent damages.

Geurrant  
vs  
Taylor.

ROANE Judge. Are you contented to take a simple affirmation without any damages for retarding the execution?

WICKHAM. Yes.

*Per: Cur.* Affirm the judgment then, without any damages.

## SPOTSWOOD

against

## PENDLETON.

**I**N an action on the case, brought by Pendleton against Spotswood in the District Court, the declaration was as follows, " Benjamin Pendleton complains of Alexander Spotswood in custody &c. of this, to wit, that whereas, first day of October 1790 there was an appeal from a judgment of the County Court of Spotsylvania, depending in the District Court holden at Fredericksburg, in which appeal the said Alexander Spotswood was appellant, and the said Benjamin was appellee, when and where it was agreed by said Alexander Spotswood that if the said Benjamin Pendleton would agree to have the said appeal dismissed, that he the said Alexander would pay him the full amount of the debt, damages and costs then due on said appeal, and the said Benjamin avers that he did agree to have the said appeal dismissed and it was in consequence dismissed, and he doth moreover aver that the amount of the debt, damages

If the appellant promise the appellee, that if the latter will agree to have the appeal dismissed the appellant will pay him the full amount of the debt, damages and costs then due upon the appeal, and the appellee consents thereto and the appeal is dismissed agreed, the appellee may maintain assumpsit on this promise.

The Court may have the question of damages in such a case to the jury.

C 2.



Spotswood  
vi.  
Pendleton.

" and costs then due upon the appeal was £ 222 : 5 : 7½. Of which the said defendant had notice by reason of all which premises the said defendant became liable to pay to the said plaintiff the said £ 222 : 5 : 7½; and being so liable he afterwards, to wit, on the day and year last mentioned, at the county aforesaid, in consideration thereof, undertook and faithfully promised that he would pay the said £ 222 : 5 : 7½ to the said Benjamin whenever he should be afterwards thereto required. Nevertheless the said Alexander, altho' often required hath not yet paid the said £ 222 : 5 : 7½ to the said Benjamin, but hitherto to pay the same hath refused and still doth refuse to the damage of the said plaintiff of sixty pounds and therefore he brings suit &c." Plea *non assumpsit*, and issue. Upon the trial of the cause the defendant filed a bill of exceptions which stated that, " The defendant moved the court to instruct the jury, that the 10 per cent before the appeal was dismissed was not due, and was not included in the contract stated in the declaration. It appearing also, from the record, that the appeal mentioned in the declaration was dismissed in the year 1791; but the court, being divided, did not instruct the jury, for the following reasons, because it depended upon the evidence, what the parties agreed was due, at the time the contract was made for the dismissal, and because the jury were the judges of the said contract, which was verbal."

There is a copy of the order for dismissing the appeal, copied by the clerk into the record, which is in these words, " Fredericksburg District Court April 30th 1791. Alexander Spotswood appellant against Benjamin Pendleton appellee, upon an appeal. This suit being agreed between the parties, it is dismissed."

There was a verdict and judgment for the plaintiff; and the defendant appealed to this court.

WICKHAM

WICKHAM for the appellant. The judgment is not described with sufficient precision, as it is the foundation and gist of the action. But if it was, still the action could not be maintained; because it is *assumpsit* for matter of record. Which will not lie, as the party has a higher remedy: Consequently if it were true that it lay for the damages, it would not for the judgment itself. Besides the Court left the question of damages to the jury improperly: 1. Because the evidence did not correspond with the declaration; which ought to have stated the amount of the damages: 2. Because the amount of the damages was a question of law; and therefore should have been decided by the Court.

Spotswood  
vs  
Pendleton.

RANDOLPH *contra*. The justice of the case has certainly been attained, and therefore every thing is to be presumed in favour of the judgment. The *assumpsit* was not in consideration of the judgment, but of the dismissal; and the judgment was gone by the appeal, having been dismissed agreed. The description is particular enough; because it is sufficient notice to the defendant. The evidence does correspond with the declaration; for it is averred, that the defendant promised to pay the amount of the damages, in consideration that the plaintiff would suffer a dismissal of the appeal.

There was nothing improper in leaving the question, concerning the damages, to the jury; because it was a matter of calculation, more than of law.

WICKHAM in reply. It is not true that the former judgment was gone by the dismissal; for that only means that the parties relinquished the question concerning the errors, but the judgment remained.

*Cur. adv. vult:*

LYONS Judge. Delivered the resolution of the Court, that there was no error in the judgment.

Spotwood  
vs  
Pendleton.

ment. That the consideration of the assumption was sufficient, and well enough laid. That the evidence was proper upon the declaration. And that there was no impropriety in leaving the question concerning the damages to the jury.

Judgment Affirmed.

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B R O O K E

*against*

G O R D O N.

If the declaration does not demand interest, and the defendant waives his plea the Court cannot give judgment for interest.

**B.** and S. Gordon brought an action of debt in the County Court upon a promissory note, for £70; The declaration demanded the seventy pounds only, without any mention of interest and concluded to the plaintiffs damage thirty dollars. The defendant took over of the note which was in these words, "Messrs. Samuel and Basil Gordon, Falmouth, Gentlemen, I will ninety days after date hereof pay to you or order seventy pounds for value received of Robert B. Voss, John T. Brooke, December 23d, 1795." The defendant plead payment. Which he waived at a subsequent Court; and thereupon the County Court gave judgment for the plaintiff for £70, with interest from the 23d of December 1795 till payment, and the costs. From which judgment the defendant appealed to the District Court; where the said judgment was reversed with costs; and the District Court proceeding to give such judgment as the County Court ought to have given, entered judgment for the £70 only, and the costs in the County Court.

From which judgment the defendant appealed to this Court.

WILLIAMS

WILLIAMS for the appellee. The judgment of the District Court is right according to the decision of this Court in the case of *Hubbard vs Blow*. \*

Brooke  
vs.  
Gordon.

*Per. Cur.* Affirm the Judgment of the District Court.

## W I L S O N

*against*

STEVENSON'S ADMINISTRATORS.

STEVENSON'S administrator gave the following notice on a forthcoming bond, "Dumfries October 9 1797, Gentlemen, Please take notice that on the fifth day of the next District Court to be held at Dumfries, or so soon thereafter as counsel can be heard, a motion will be made for judgment on a bond granted by Richard Graham (now deceased) and Cumberland Wilson to John Stevenson administrator of William Stevenson, dated the seventeenth day of December seventeen hundred and ninety five, for the sum of eleven hundred and two pounds, eleven shillings and four pence, conditioned for the delivery at the courthouse of Dumfries on the fifteenth day of February 1796, of eighteen slaves given up to George Lane deputy sheriff of Prince William county in lieu of the body of the said Richard Graham, taken by said George Lane deputy sheriff by virtue of a *capias ad satisfaciendum* issued from the said District Court on a judgment obtained there at the suit of the said John Stevenson as administrator of the said William Stevenson for the non performance of debt and costs, balance then due, amounting to five hundred and fifty one pounds, five shillings and eight pence

*Query* If there be a joint notice given on a forthcoming bond, to both obligors the plaintiff can take judgment against one of them only?

If the forthcoming bond be not forfeited at the time when the injunction issues the penalty is saved; but it is otherwise, if the bond be forfeited before the injunction issues.

\* April term 1792.

Wilson  
vs  
Stevenson.

"pence. James Smith attorney in fact of John  
"Stevenson administrator of William Stevenson  
"deceased. To Mr. Cumberland Wilson and  
"George Graham administrator or executor of  
"Richard Graham deceased." This notice was  
served upon Graham and Wilson both.

After reciting the said notice, and the appearance of Wilson and Graham by their attorney with a continuance of the cause from day to day for several days during the term, the record proceeds thus,

" John Stevenson administrator of	} " Upon
" William Stevenson. Plaintiff.	
<i>against</i>	
" Cumberland Wilson & George	
" Graham administrator or executor	
" of Richard Graham	} " motion for
Defendants.	
"ham deceased and Cumberland Wilson to the	" judgment
" plaintiff, for the forthcoming of property given	" on a bond
" up by the said Richard Graham in lieu of his body	" executed
" taken by virtue of an execution issued from	" by Rich
" this Court, at the suit of the said plaintiff.	" and Gra

" This day came the parties by their attorney  
" and their arguments having been fully heard and  
" mature deliberation thereon had, it is considered  
" ed by the Court that the plaintiff recover against  
" the defendant *Cumberland Wilson* eleven hundred  
" and two pounds eleven shillings and four pence  
" the debt in the said bond mentioned &c. And  
" the plaintiff has leave to discontinue his motion  
" tion against the other defendant."

The bond is joint and several. On the execution is endorsed " Executed and eighteen slaves given  
" up in lieu of his body and enjoined in the High  
" Court of Chancery before the day of sale mentioned  
" tioned in the within bond for their delivery."

There is a copy of the injunction bond copied into the record.

Wilson

Wilfon appealed, from the judgment of the District Court, to this Court.

Wilfon  
vs.  
Stevenfon.



WICKHAM for the appellant. The notice is that the plaintiff will move for a joint judgment against the surviving obligor and the representatives of the decedent, which could not be rendered; but, if it could, the plaintiff has only taken judgment against the surviving obligor, and discontinued against the administrator. Which is erroneous; because the judgment does not pursue the notice. Such a declaration would have been bad; and a notice, which is in the nature of a declaration, stands upon the same ground. So that what is requisite in the one, is necessary in the other also; and it is right it should be so, or otherwise the defendant does not know how to defend himself.

But, upon the merits, the plaintiff was not entitled to judgment; because the injunction, having issued prior to the day of sale, discharged the obligors from performing the conditions of the forthcoming bond. For, if the sheriff had had the property in custody, he must have discharged it; and the forthcoming bond was but a substitution for the property. Therefore if the property was liable to be restored, the bond ought to have been given up. For the law does not require a vain thing to be done; that is to say, that the obligors should deliver the property and take up their bond, in order that the sheriff might return the property the next moment. It is like the case of one who is special bail for another, and the principal is made a *peer* or enlists as a soldier; in which cases, the court will order an *exoneretur* to be entered at once, without requiring that the body should be first rendered; because it would be discharged immediately, if it were. This, which is clear upon principle, receives additional weight from the act of Assembly, directing the money made on the execution, to be restored to the defendant at law, upon the emanation of the injunction; which

looks

Wilson  
*vs.*  
 Stevenson.

looks as if the Legislature meant to prescribe a general principle, applicable to all stages of the execution; for there can be no reason, why the money should be restored, and the property not.

**BOTTS and CALL *contra*.** The notice is sufficient. These proceedings are not like those at common law; and therefore do not require the same precision. It is sufficient, if the defendant is substantially informed of the nature of the motion; which is as effectually done by a joint as a several notice; because he is equally as well informed, as to the merits of the claim, by the one as the other. The case does not resemble that of a joint declaration, upon a several contract, at common law. For there the plaintiff fails in the proof of the contract, as he declares on one contract, and proves another; so that the defendant could not be prepared to meet the testimony. But it is still the same forthcoming bond, whether the notice be joint or several; and therefore there is no failure of the evidence or mistake as to the nature of the claim. Thus then it appears that even if a joint judgment could have been taken, the notice was insufficient. But the argument is *a fortiori* where a joint judgment could not be taken because there the notice must operate severally or not at all. Therefore the entry of the discontinuance, as to the administrator, cannot prejudice the cause; for it was a work of supererogation, and no more than the law would have done without. For as the notice operated severally, and distinct judgments were to be taken, that part of it which related to Graham's representatives was surplusage merely; and therefore the entry of a discontinuance as to that has no effect one way or the other. Besides when the plaintiff followed up his notice only as to one of the defendants, he necessarily waived it as to the other.

The forthcoming bond was a discharge of the judgment, 1. *Wasb.* 92; and therefore absolute compliance with the conditions of the bond was requisite.

Wilson  
vs  
Stevenion.

requisite. It is generally true, that an injunction leaves things as they were; that is to say, the plaintiff or sheriff cannot proceed to a sale, but still it is the duty of the obligor to perform his condition; because it was inserted for his benefit; and he cannot save his penalty without fulfilling it. But, it is a clear principle of law, that a man cannot excuse himself, from the performance of a condition, by his own act. *Telv. 207*; and as the injunction is of the obligors own seeking, he ought not to be received to object it against the compliance with his bond. Which argument, in the present case, is just as applicable to the security, as to the principal; for the same person who is security to the injunction bond, is security to the forthcoming bond, likewise. So that, having enabled the principal to sue the injunction, he ought no more to be allowed to object that circumstance, than the principal himself.

*Cur: add: vult:*

LYONS Judge. Delivered the resolution of the court to the following effect. That, if the forthcoming bond be not forfeited, at the time, when the injunction issues, the penalty is saved; because the compliance with the condition would be useless, as the property must be restored immediately, that it was delivered to the sheriff; and therefore the law would dispense with it. But, if the forthcoming bond is forfeited before the injunction issues, the injunction does not discharge it, but the obligors continue liable still. That as the court were clear upon this point, they left that relative to the notice undecided.

Judgment of the District Court reversed.

COPLAND



## BUCK &amp; BRANDER.

against

## C O P L A N D

A empowers C to purchase lands for him; M empowers B to sell lands for him, with directions to give C a refusal. A informs B that he and C are the same person, and offers 2s, saying if M will not take that price he will give more than any other person. B promises C and A a refusal; but afterwards, without informing M of their offers, purchases for himself; A court of equity will not decree the benefit of this transaction to A, but if the trust was proved, would set aside the sale in favor of M; who ought to be made a party to the suit.

THE bill states, that Copland being disposed to lay out some money, which he had by him, in the fall of 1795, he mentioned it to Hicks and Campbell, and told them, if they would purchase some military lands for him out of his own money, that he would allow them a commission of 5 per cent. That they afterwards told him, that Benjamin Mosely wished to sell; and that they had offered him 2s, which he had refused; but said that he would authorize the defendants to sell; and that they had spoken to the defendant Brander who had promised them the refusal. That in a few days afterwards, the plaintiff enquired of Hicks and Campbell, whether they had heard any more of the matter? That they answered they had not, and advised the plaintiff to apply to the defendants. That the plaintiff applied to Buck & Brander accordingly, between the 1st and 16th of November; Told them that Hicks and Campbell were purchasing for him, and offered 2s. That the defendants said, they had been authorized by Mosely to sell, in order to pay a debt due themselves; but he had desired them not to take 2s, until he had advised with them; That they would write to him mentioning the plaintiffs offer, and in the mean time would enquire of the value. That the plaintiff told them, if Mosely would not take that price to let him have the refusal, as he would give as much, or more, than any other person, for it. That the defendants promised

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In such a case as the transactions between A, C and B were not in writing, B, may plead the act, to prevent frauds and perjuries.

Buck, &amp;c.

as  
Copland

promised to do so; and one of them, afterwards, told the plaintiff that he had written, but no answer had come to hand. That the plaintiff again offered 2s; which that defendant said he believed was the price, and, if Mosely would take it the plaintiff should have the lands. That he would let the plaintiff know, when he heard from him. That the plaintiff had, from the commencement, resolved to give 2/6, if he could not get the lands for less. That all this related to two surveys only, of 1000 acres each; for the plaintiff did not know that Mosely owned more. That the defendant Brander, afterwards, told the plaintiff, there were upwards of 2600 acres, and that Anderson the surveyor had a claim for his fees, or for a proportion of the lands, and asked the plaintiff's opinion, which would be best. That the plaintiff advised him to pay the fees; and offered to advance the money, and take the whole lands, at 2s, deducting the fees. That the plaintiff continued to apply to the defendants to know if they had heard from Mosely; and was always told that they had not; although they had written him several times. That the plaintiff was bound by his offer, if the lands had fallen in value, and always kept the money ready. That he did not apprehend any unfair dealings in the defendants with whom he was intimate; but relied on their integrity; and never suspected that they wished to buy themselves. That the defendant Buck, at length, told the plaintiff, that he believed Brander had a letter from Mosely, who consented to take 2s; but that there was some difficulty with respect to an overcharge for the surveyors fees. That the plaintiff answered, that circumstance should make no difference; for he would look to the surveyor himself; and desired Buck to tell Brander so. That Buck, at going off said, for the first time, that he believed Brander intended to keep the lands. That the plaintiff went to Brander and insisted on the contract; but Brander refused, saying all that he had promised to the plaintiff was, that the plaintiff

tiff

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should have the refusal; and that Kinkaid had bargained for the land for Buck and Brander; who had written him to do so. That the plaintiff replied, that the defendant had always informed him, that he had written to Mosely which he admitted; but said, it was only a difference in names, and not in substance. That the plaintiff mentioned what Buck had said; relative to the overcharge for surveyors fees; but Brander said Buck was mistaken; for only the legal fees were paid. That the plaintiff then offered 2/6, the price he first intended to go to, if Mosely had refused 2/. But the defendants refused; upon which the plaintiff tendered the money for the said 2000 acres at 2/. The bill therefore prays a conveyance of the 2000 acres and for general relief.

Buck and Brander the defendants plead the act of General Assembly, to prevent frauds and perjuries, to the discovery; and by answer they state. That they were interested in two concerns, one in Manchester, and the other in Buckingham. In which last Robert Kinkaid was a partner. That both were dissolved, previous to any of the transactions in the bill mentioned. That Brander settled the affairs of the Manchester business and Kinkaid those of the Buckingham business. That Mosely owed the firm of Kinkaid & Co. £ 355 : 19 : 3 (on which judgment had been obtained;) and Kinkaid and Co. were indebted to Buck and Brander. That Mosely told the defendants, he had 2666 acres of land; but expected 666 acres would go to pay the surveyor. That he had offered the balance of 2000 acres to Hicks and Campbell, who offered him 2/, per acre; but from their anxiety to purchase, he thought they would give more. That he asked the defendants to apply to Anderson the surveyor, pay him his fees, and endeavor to sell the lands to the best advantage, or retain them to the use of Buck and Brander; in either case crediting his account with the amount of the sales; But added, at the

same

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~~first-time~~ that if the defendants should sell the lands, he hoped they would give Hicks and Campbell the refusal, as he had promised the same to them. That at this time, Buck was from home, and Brander wanted to consult; or the bargain might perhaps, have been then made: But, as it was, Brander only said that he would endeavour to sell the lands for the best price that could be gotten, and would correspond with Kinkaid concerning them. That Brander conversed with several, but found none willing to give as much as Hicks and Campbell; although he learnt from Quarles that the lands would rise in value. That, upon Buck's return, the defendants resolved to take the lands, and thereupon a correspondence was opened with Kinkaid, about them. That one part of the contract with Mosely, was that he should have a further stay of execution, for the balance of the money. That, between the time that the defendant was entrusted to sell, and the purchase of Mosely, the plaintiff frequently threw himself in the way of the defendants, and conversed about the lands. Once at Hicks and Campbells; who followed the defendant Brander and said, if more was offered than they had offered, they would give as much as any man; and asked the refusal; which the defendant promised. That, from conversation with the plaintiff on the subject, the defendant found out, that giving a preference to Hicks and Campbell and to the plaintiff was the same thing. Perhaps, at other times, the defendant might have promised the refusal to the plaintiff; Knows that under the impression, that Hicks and Campbell and the plaintiff were all one, the defendant did make the promise of a refusal to him. That the defendant never offered the land to the plaintiff, but, having from the first determined to buy himself, he wished to avoid the plaintiff; who he feared, might take some unfair advantage of him, with Mosely. Possibly the defendant might have mentioned Mosely's name to the plaintiff; but supposes, it was in such a way, as to shew the cor-

respondence

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respondence was carried on, through the medium of Kinkaid. Admits the tender, after the plaintiff knew that the defendants intended to take the lands themselves. That the defendants did not pay the fees, on the first interview with Anderson: That the plaintiff advised him to pay them; and said that he would advance the money, and take the whole deducting the fees. To which the defendant made no reply. That the plaintiff once said to Buck, that he would give more, than 2/; and that he and Hicks and Campbell were the same thing. That from the first application to the defendant Buck, the plaintiff was told the land was to be sold to pay a debt due to Kinkaid & co. that Buck and Brander were to have the money; and that he did not know that the lands would be for sale, which might have induced a belief, that the defendants intended to take them. That the defendant Buck never made any contract with the plaintiff, or promised him the refusal.

Amongst the exhibits filed in the cause, are, the agreement between Mosely and the defendants for the purchase of the lands. An acknowledgment by Hicks and Campbell, that they were treating for the benefit of the plaintiff. A letter from the defendant Brander to Kinkaid (referred to in the answer,) mentioning that Mosely had authorized the defendants to sell. That, agreeable to his instructions they had offered 2000 acres for sale, giving as he wished a preference to Hicks and Campbell; who seemed steady, as to price, and offered no more than 2/. That he afterwards applied to Pickett, Fenwick, Quarles and Anderson; but none of them would give as much as Hicks and Campbell. That, finding the above price might be got any day, he wished Kinkaid to mention it to Mosely, and ask his concurrence in a sale. That it was probable, if Buck and Brander could spare the money, they might take; and that he supposed a sale, to them, might be as agreeable, as to Mosely. That, if Mosely

agreed

agreed to the sale, he might credit him for the same by Buck and Brander.

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<sup>as</sup>  
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Another letter from Kinkaid to Brander. Informing him, that Mosely will let him have the lands; although he had hoped for, and expected something better. A third letter from Brander to Kinkaid. Stating, that he, as well as Mosely, had once hoped to get more from Hicks and Campbell, from their anxiety to purchase of Mosely, or at all events to have a preference, from whom he should empower to sell the land. A promise which they said they had obtained, and he believed that they had promised Mosely, if any body would give more, that they would come up to it: But he believed, it was only to gain their object; as they were the highest bidders in the market by a third. That it was not till after two applications to Hicks and Campbell (who were steady in the price of 2s.) that he thought of taking the lands on account of Buck and Brander. That if Mosely was dissatisfied he was at liberty to make the most of the lands.

The Court of Chancery was of opinion, that the act of Assembly, to prevent frauds and perjuries, was not pleadable by the defendants; but that they were trustees for Copland; and ordered a conveyance, upon payment of the money, or a tender thereof. From which decree Buck and Brander appealed to this court.

WARDEN for the appellants. The act of Assembly is express, that no suit can be maintained on a parol agreement; and at law no action would have lain. Courts of Equity have been extremely cautious not to depart from the principles of the statute which is a beneficial one, and ought to be adhered to. 1. *Wms.* 618, 770. *Pow. Contr.* 281: But our act of Assembly is more extensive in its operations than the act of Parliament in England. For the recital of the preamble, in the British statute, seems to countenance the idea, that particular cases only were intended to be provided for; but

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but our act was manifestly intended to include all cases of parol agreements not particularly excepted by the words of the statute.

Nor will the admission in the answer help the plaintiffs case; because the act of Assembly has been plead and insisted on. 1. *Fonbl. Eq.* 165. Besides the answer does not admit any precise agreement; nor does the bill charge one, but merely a promise of refusal; and Copland had not agreed on any particular price, nor could have been forced to give the best price, in the market.

CALL and WICKHAM *contra*. As the defendants have confessed the agreement in their answer a performance may be decreed. *Ambl.* 586. 1. *Black.* 600. 3. *Att.* 3. This rule has no exception, where there is an express confession of the contract. For the distinction is, where the statute is plead and the agreement denied, and where the statute is plead and the agreement confessed. In the first case, you cannot resort to evidence to disprove the answer; but in the other, you may hold the defendant to his confession. Because there is no danger of either fraud or perjury, the two evils which the statute was intended to guard against. It is like a declaration at law, which need not state, that the agreement was in writing, but it is sufficient to prove it on the trial; and, if the defendant confesses the action, judgment will be rendered against him,

The doctrine in 1. *Fonbl.* 165, does not overthrow this reasoning. 1. Because that was but the solitary *dictum* of a single Judge, in a case, where, it appears, the plea was overruled. 2. Because the ground, he put it on, is not the true one; and never was assumed in any case before. For a man, by omitting to plead a general statute, does not lose the benefit of it: Which is proved by the cases at common law, where the defendant does not plead the statute, but takes exception at the trial. The rule on the act of limitations is no answer; for that proceeds upon a different ground, namely,

namely, that there are exceptions in the statute, as infancy, coverture and absence beyond seas; which the plaintiff ought to have an opportunity of shewing. So that the difference is, where the plaintiff has a right to be informed of the nature of the defence, and where he has not. But as the statute of frauds contains no exceptions, the defendant is not bound to plead it; because the plaintiff stands in no need of the information. Hence the reason, given in the *dictum*, is not only unfounded in principle, but is not the ground of any decision. 3. Because Lord Thurlow does not adopt that reason, in the opinion which he afterwards delivered; which, if it had been considered as sound, he certainly would have done; because it would have relieved him, from a great deal of nice discussion.

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The cases therefore may all be resolved into Lord Thurlow's distinction. That the plaintiff shall not produce evidence *aliunde* to disprove the answer; but if the answer does confess the agreement, as the plaintiff has no occasion to resort to evidence, the defendant shall be held to his confession. 2. *Bro. Cas. Ch.* 507.

Nor is it material that the plea in that case was ultimately allowed. For the last decree did not decide against the ground taken in the first, but turned on quite distinct principles; namely, 1. The difference between the contract stated in the bill, and that confessed in the answer. 2. The original incompleteness of the contract; which was not definitive, but left a *locus penitentiae*: therefore the court, so far from overruling the doctrine, clearly admits that it will prevail; and consequently ought to be understood as having decided upon the circumstances of that particular case. Of course, as the defendants have, substantially, admitted all the allegations of the bill in the present case, they are bound by their confession; and the more especially, as it is the case of



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a trust. 2. *Atk.* 156. For the rule is, that the statute never shall be interposed to cover and protect a fraud. 1. *Fonbl.* 171: And as the defendants were the agents of both parties, and had, in effect, undertaken to procure the lands for the plaintiff, they will not be allowed to disappoint him, and take the purchase to themselves, under a pretence, that, as the agreement was not in writing, it cannot be carried into effect. 2. *Ex. cas. ab.* 50. *pl.* 26. *Mosely rep.* 39.

RANDOLPH in reply. This is probably the first case on our statute, and the English decisions proceed upon false principles. The doctrine, in effect, goes so far as to say, if a man is honest and tells the truth he is gone; but if he will be bad enough to tell a falsehood, and deny the truth, he is safe. However, even upon the English case the plaintiff cannot succeed. For, the distinction is, where only the plea states the statute, and where the plea and answer both state it: *Prec. Ch.* 20. But in this case the answer expressly insists upon the benefit of the statute; and therefore it does not fall within the principles of those decisions. The case of *Whitcomb vs Bevis* 2. *Bro. Ch.* 567, was ultimately decided upon the authority of *Whaley vs Bagenal* in the House of Lords. 6. *Bro: Parl. cas.*; which appears to have exploded the doctrine, that a confession in the answer would avoid the plea of the statute.

But, be that as it may, the plaintiff, upon his own shewing, was not entitled to recover. If he does not state (and much less, does the answer confess) any positive agreement. It was merely a promise of the refusal, and not an undertaking to procure the lands for the plaintiff. Therefore he might decline taking them, when they were offered. Indeed the very promise of a refusal implies a right to reject the offer. But both parties must be bound or neither. *Cook vs Oxley* *Term rep.* 653. Which is consistent with the doctrine laid down by the court in the latter part

he case of *Whitchurch vs Bevis*, Bro: cas. Ch. There was consequently no contract, which could be the foundation of an action; and therefore the plaintiff was clearly not entitled to relief.

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But the decree is erroneous upon another ground; namely, that Mosely was no party to the suit. Because he was essentially interested in the question; and the rule is, that all parties, having any interest in the matter to be decided, ought to be plaintiffs or defendants to the suit. *Harr: Ch: tract: 38, 41.* Therefore, as Buck and Brander have not the legal title, but merely possession of the surveys, a decision between them and Copland, may eventually affect the interest of Mosely; who ought consequently to have an opportunity of defending his own interests.

There is no pretext for saying that Buck and Brander were the agents of Copland. No evidence shews that they undertook to perform any thing for him; and they expressly deny that they were agents.

**CALL contra.** The case of *Whaley vs Bagenal* is probably inaccurately stated in the report of *Whitchurch vs Bevis*; which is the only account we have been able to procure of it, at this place. But, at any rate, that case affords nothing contrary to the doctrine we contend for. Because it appears, that there was no answer in the cause; and therefore there could have been no decision upon the point of confession, whatever the abridgment of the case may state. For the Lords never give any reasons for their judgment; but content themselves with a silent vote.

The case of *Cook vs Oxley*, 3. Term rep. is a strange one; and seems contrary to an opinion in the year books. 5. Vin: ab: 515. pl. 10, 11. But, at any rate, it will not affect the present case, because here was an absolute agreement to take at two shillings; and Copland was positively bound

for

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for that sum. Therefore the refusal only applied to the case, of more than two shillings being offered by some other person; and it is to the latter event only, that the case of *Cook vs Oxley* will bear any application.

There was no necessity for making Moseley a party; because no conveyance of the lands from him to the defendants was necessary; the assignment of the survey and papers was sufficient. So that the defendants are in possession of a title which they can make effectual, without any further act from Moseley: And that will enable us to proceed against them.

*Cur: adv: vult.*

LYONS Judge. Delivered the resolution of the Court as follows.

The Court after mature consideration, does not discover that Mr. Copland is entitled to the relief which he sought by his bill.

Indeed such a suit, in a Court of Equity, appears to be a little extraordinary. For if we understand the nature of it, as stated in the bill. It is to obtain the transfer of a fraudulent contract, supposed to have been made by Buck and Brander, as trustees for Copland, with Moseley, without allowing the latter any satisfaction for the injury, or even making him a party to the suit; although he was original owner of the land, and the person on whom the fraud was first and principally committed: Since it is charged, that Buck and Brander concealed from him, the offer by Mr. Copland of two shilling per acre, and of more than any other person would give for the land. So that according to that statement, Moseley had a right to set aside the contract with Buck and Brander, and to have the land restored to him again: And as Copland had made no contract with him, he could derive no claim from the sale to the others.

But

But Mr. Copland insists, *that* he confided in Buck and Brander to make the purchase for him; *that*, by promising to write to Moseley on his behalf, they thereby became invested with a fiduciary character; and were converted into trustees for him, as well as for Moseley; *that* acting as trustees for Moseley, they had promised him a refusal of the land, and therefore ought not to have purchased for themselves without his consent: *that* such trusts are not within the statute of frauds, but a Court of Equity will enforce an execution of them; and therefore, *that* the plea in the present case will not avail the defendants, who being in possession of the lands and title papers are not entitled to hold them; but ought to convey them to him, and not enjoy the benefit arising from their own misconduct.

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But how is the trust proved? Buck and Brander deny it. They aver that they had power from Moseley either to sell the lands or retain them to their own use, in part of the debt due to them; and that they only promised a refusal to Copland in case they should sell. They deny that they ever wrote, or engaged to write to Mr. Moseley, for or on behalf of Copland, or made any other promise, than a refusal, in case more than two shillings per acre should be offered; finally they deny that they ever had any offer made to them, by Copland or any other person, of more than two shillings per acre, until after the agreement was made with Mr. Moseley, for the purchase on their own account; although they admit that Mr. Copland (who according to his own statement, at last only tendered two shillings) sometimes stated that he would give more, but did not say how much. In all which respects the answer is not contradicted, or disproved by any testimony in the cause; and, as it is responsive to the bill, the facts as therein stated, must be taken to be true. So that the trust is so far from being confessed, that it is positively denied, and the plaintiff produces

no

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no evidence to establish it. Of course the arguments bottomed on the trust all vanish; and the plaintiff had no foundation for relief upon that ground.

But if the trust was established, yet Mosely who was so much interested, and is said to have been injured by the transaction, ought to have been made a party. For surely a Court of Equity would not decree all the benefit of the fraud, if one was committed, to the plaintiff only; and give him the whole gain arising from the misconduct of his own trustees. On the contrary we suppose, that in such a case, a Court of Equity would set aside the sale to Buck and Brander; and (as the promise to Mr. Copland was only of a refusal of the land, so that he might perhaps be allowed to take it, or not as he pleased,) direct a new sale. By which means Copland would have an opportunity of bidding for it, and by a fair public sale, justice would be done to Mosely, the party most injured in the business; and who was conscientiously entitled to the best price that could be gotten for the land.

But as no trust is proved and no agreement in writing shewn, Mr. Copland has no equity; but was completely barred by the plea.

The decree of the Court of Chancery, therefore is to be reversed, and the bill dismissed with costs.

MEADE

## M E A D E

*against*

## T A T E.

**T**A T E assignee of William and James Donald and company, brought debt in the County Court against Nicholas Meade, upon a penal bill. The defendant plead payment. And on the trial of the issue the plaintiff filed a bill of exceptions stating, that the defendant introduced the deposition of William Meade, who said, that some time before the above company's agent Robert Montgomerie left the county of Bedford, the deponent paid him a sum of money, he thinks about thirty pounds, perhaps a little more or less, in discharge of a debt due by Nicholas Meade the defendant to the said company, for which they had his the said Nicholas's bond or note, which when applied for, the deponent was informed by the said Montgomerie, that it had been sent off with the books of the company, and in lieu thereof he obtained a receipt in full of the debt aforesaid. Which receipt is either lost or mislaid. That the money so paid was not in discharge of aught that was due from the deponent to the said Nicholas, but was paid by the deponent at the special request of the said Nicholas, who thereby became indebted to the deponent in the sum so paid. That the defendant also introduced a witness who said, that William Meade was heard to say, that Nicholas had paid him the money he had advanced to William and James Donald and company, before the bringing of the suit. That the plaintiff objected to reading of the deposition aforesaid, as illegal evidence; but that he was overruled by the court.

Verdict and judgment for the defendant. Whereupon the plaintiff appealed to the District Court.

The District Court was of opinion that the judgment was erroneous, in this, "That, the County

A witness received to prove that he paid a sum of money for the defendant to the agent of the plaintiffs assignors in discharge of the obligation upon which the suit was brought.

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"County Court permitted the deposition of William Meade who was interested in the event of this suit to go as evidence to the jury." It therefore reversed the judgment, with costs; set aside the proceedings subsequent to the issue; and sent the cause back to the County Court for further proceedings to be had therein. Meade appealed from the judgment of the District Court to this court.

RANDOLPH for the appellant contended that the witness was not interested, and therefore that the judgment of the District Court was erroneous.

*Per: Cur:* Reverse the judgment of the District Court; and affirm that of the County Court.

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HENDERSON, &c.

against

HEPBURN, &c.

An action, in the name of the assignee of a bond with a collateral condition dated in 1774, is not maintainable.

What a bond with a collateral condition.

HEPBURN and Dundas assignees of Maynadeer administrator, &c. of Murray brought debt against Henderson & others executors of Kirkpatrick, upon a bond, with a collateral condition, given by Kirkpatrick, June 9th 1774, to Murray. The condition of the bond was as follows, "Whereas the above bound Thomas Kirkpatrick

"hath this day by indentures of lease and release, bearing date the eighth and ninth days of this instant June, bargained and sold a tract of land, situate in the county of Fairfax aforesaid, supposed to contain nine hundred and forty six acres, to the above named James Murray, for the sum of one thousand pounds, Virginia currency: And whereas it is doubted whether some

"with

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Hepburn.

"with the said land so bargained and sold and  
 "take part of it away; and it is proposed, that  
 "the same shall be surveyed and plotted, to as-  
 "certain the true number of acres contained in  
 "the said land, free, clear and exclusive of all  
 "and every other elder patents and surveys, and  
 "that there shall be a proportionable deduction  
 "and abatement, from the said sum of one thou-  
 "sand pounds, for such quantity of the said land  
 "as may appear to be wanting and deficient after  
 "making such survey and plott, occasioned by  
 "any older patents and surveys, or otherwise.  
 "Now the condition of the above obligation is  
 "such, that if the above bound Thomas Kirkpa-  
 "trick shall cause the said land to be accurately  
 "surveyed on or before the fifteenth day of No-  
 "vember next ensuing, at the joint and common  
 "expence and charge of the said Thomas and the  
 "said James Murray, and shall, in case any de-  
 "ficiency shall appear to be in the said quantity  
 "of nine hundred and forty six acres after such  
 "survey, allow an abatement and deduction for  
 "such deficiency from the said sum of one thou-  
 "sand pounds, according to the proportion that  
 "the said sum of one thousand pounds bears and  
 "hath to nine hundred and forty six acres; or in  
 "case that the said sum of one thousand pounds  
 "shall be paid before the said deficiency shall be  
 "ascertained, if the said Thomas shall repay and  
 "refund to the said James Murray, his heirs or  
 "assigns such sum as he or they may and shall be  
 "entitled to for such deficiency according to the  
 "proportion aforesaid. That then and in such  
 "case the above obligation shall be void, other-  
 "wise that it shall be and remain in full force  
 "and virtue."

The plaintiffs assigned for breaches of the con-  
 dition, "That neither the testator of the defend-  
 "ants in his life-time nor the said defendants  
 "since his death have refunded to the said James  
 "Murray or any person claiming under the said  
 "James



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"James Murray, or the said plaintiffs for the deficiency of the land mentioned in the condition of the bond, so much money as they were entitled to receive for the deficiency aforesaid according to the proportions mentioned in the bond."

The defendant plead *conditions performed* and the plaintiff took issue. The jury found a verdict for the plaintiff for £ 269 : 4 : 6 damages. The defendant moved to arrest the judgment on the following reasons. 1. Because the bond declaration mentioned was not assignable. 2. Because the plaintiff, in assigning breaches, did not state there was any or what deficiency in the land occasioned by the interference of older patents or surveys; or the sum to which the plaintiff was entitled on account thereof.

There are amongst the papers copied into the record, a copy of a survey made in pursuance of an order of the court, whereby the true quantity of the land appears to be 820 acres. The notice making the said survey is accepted by Wilson, who states himself to be attorney for the executors.

The District Court gave judgment for the plaintiff; and the defendants appealed to this court.

CALL for the appellant. The bond, being dated in 1774, was not assignable, *Craig vs Craig* in this Court; and perhaps the plaintiffs have no title for another reason, namely, that the assignment is made by the executors when the bond belonged to the heir *Eppes vs Demoville* † in this Court. The condition of the bond is in the alternative, that is to say, that, if the purchase money is paid before the survey, then the obligor will refund, but if not, then that he will rebate in proportion to the deficiency. Now it does not appear, from the manner in which the breaches are assigned, whether

\* 2. Call's Rep. p. 483.

† Ante 22.

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There ever was any rebatement or not; frequently the assignment is in the nature of a negative pregnant; for although no money has been refunded, yet it might have been rebated. The argument is the stronger, when it is recalled, that it is not stated, whether the purchase money was ever paid or not; and if it never was, then the plaintiffs claim, at most, was only for a loan, and not for repayment. In which case they would not have stated a title to recover, and at any rate, the omission to state the quantity of land, in which the tract was deficient, is fatal; it was necessary in order to apprise the defendants with what they were charged, so that they might come prepared to defend themselves. See *Walter vs Vass* \* and *Cabell vs Hardwicke* † in the Court: which last case was a decision in every point.

*WICKHAM contra. Craig vs Craig* is not applicable to this case; because that was the case of a bond for the title, and not a bond for payment of money as this is; for the repayment was to be in an exact proportion to the deficiency. Now it is certain which may be rendered certain; and this was capable of being reduced to a sum of money, by mathematics and arithmetic. Take it then, as a money bond, and the case is different; because the act of Assembly, passed in the year 1748 ch. 27, is express that bonds for payment of money or tobacco may be assigned, *old Virginia laws* 249. The case of *Eppes vs Demoville*, was a bond for title; and therefore no argument can be derived from it in favour of the appellants. Besides that case turned on the form of the action. The defendants cannot except to the assignment of breaches, after the plea of conditions performed and issue on it, with a verdict in favour of the plaintiff; because the plaintiff

\* 1. Call's Rep. p. 83.

† 1. Call's Rep. p. 345.

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HEPBURN.

tiff must have proved a deficiency upon the trial, or he could not have obtained a verdict. *Cabell vs Hardwicke* turned on the omission to state for whose benefit the suit was brought; and therefore is not like this case. In *Call vs Ruffin*\* the breaches were as imperfectly stated as in this case; but yet the Court thought them sufficient after verdict. The judgment in this case, will be a perpetual bar to all future actions on the same bond. Besides the defendants consented to a survey; and thereby have agreed, that what was dubious before, should be reduced to certainty. This is an action of debt which is less strict than covenant; and therefore there was less necessity to be particular in assigning the breaches.

CALL in reply. Independent of the decision in *Craig vs Craig*, it is a general principle of the common law that no paper given for a contingent or uncertain demand is assignable. Thus a bill of exchange or a note for payment of money is not negotiable, if the payment depends upon a contingency. This was clearly a bond with a collateral condition; for first, it was to be ascertained, whether there were any older or interfering titles, and then, what deficiency they produced, before the plaintiff was entitled either to a rebatement or to have any thing refunded to him. Therefore, in order to maintain the action, it was essential to state in the declaration, either that there had been a survey and deficiency ascertained, notwithstanding which the testator and his executors refused to rebate or refund, as the case might be, or else that the testator had failed to have the survey made, within the stipulated period; in which latter case, the damage would have been the loss of the rebatement or refunding, which had not been ascertained for want of the survey. The case of *Cabell vs Hardwicke* did not turn, merely upon the omission to insert the name of the person for whose benefit the suit was brought, but the

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\* 2. Call's Rep. p. 333.

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the insufficiency in the assignment of breaches was no one of the grounds, expressly, on which the Court proceeded. The plea of conditions performed, makes no difference; for that was the plea in *Tabell vs Hardwicke*; and yet it was not thought sufficient to maintain the declaration. The order of the survey, stated in the record to be made by consent, does not assist the plaintiff; because it forms no part of the pleadings; and it is not asserted, on the record, that the object was to supply the defects in the prior proceedings.

**WICKHAM.** Bonds are assignable, under the act of Assembly, in some cases where bills of exchange are not; and it never has been admitted in any case, that with respect to negociability there was any great similitude between bonds and bills.

**CALL and BOTTS.** If that argument be correct, then every manner of bond is assignable; because money or tobacco is recoverable on all bonds.

*Cur. adv. vult.*

**LYONS Judge.** Delivered the resolution of the Court, that the bond was clearly a bond with a collateral condition, and therefore not assignable within the act of 1748. Consequently that the judgment of the District Court was to be reversed; and judgment on the verdict arrested.

Judgment Reversed.

**N.-B.** Judge Roane was confined to his room by indisposition, upon the day on which the Court gave judgment; and therefore was not present when the resolution of the Court was given, but he has favored me with a copy of the notes of the argument he intended to have delivered, which were as follows.

“The first and principal question, in this case, is, whether the bond, declared upon, is such a

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bond, as under the act of Assembly will authorize an assignee thereof to bring suit upon it, in his own name?

The bond is dated on the 4th of June 1774, and assigned the 17th of November 1791. It will therefore be governed by the act of October 1780 Chap. 29; and in the new code the clause of the act now in question is, as follows, "Assignments of bonds, bills and promissory notes and other writings obligatory for payment of money or tobacco shall be valid &c." So that the question is, whether the bond, before us, is a bond for the payment of money within the meaning of this clause? and this question may be elucidated, if not resolved, by considering what bonds are considered as bonds for the payment of money, in other and clearer passages in our laws?

- By the act of 1748, re-enacted in 1792 *Rev. Code* 118, it is enacted that in actions which shall be brought on a bond or bonds for the payment of money, judgment is to be entered for the principal sum due thereon and interest. The bonds, here intended, are clearly such as if not single bonds are to be defeazanced by the payment of a lesser ascertained sum, called the principal, and which no assessment by a jury is necessary to calculate and render certain; bonds, which when declared on, do not require particular breaches to be assigned; and in which a recovery is had, as of the debt due by the bond, and not as of damages to be ascertained by a jury.

Such is clearly the nature of a bond, for the payment of money, in the clause just referred to; and if, in the clause immediately in question, the same words are found, as descriptive of assignable bonds, the former clause may be resorted to, as a key for the understanding thereof.

But, by the same clause of the act of 1792, in actions on bonds, for performance of covenants, particular breaches must be assigned; and a jury

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re to assess, and the court to give judgment, for damages, instead of any lesser ascertained sum in the condition.

The distinguishing criterion then, between these two descriptions of bonds, is plainly marked out by the act of 1792. That criterion existed in our laws, before the period in which it was transferred into the new code, from the acts of 1748; and must be supposed to have been in the mind of the legislature, when it enacted the clause allowing assignments.

By that criterion, whenever a bond appears, with a smaller specific sum, mentioned in the defeazance, or the bond shall be single; whenever judgment is to be given for that sum with interest, and not for damages to be ascertained by a jury; and whenever particular breaches are not necessarily to be assigned, a bond of this description is a bond for the payment of money, within the meaning of the clause in question. But if there be no ascertained principal sum, for which judgment can be rendered; if the intervention of a jury be necessary to ascertain what is due by way of damages; and if the defendant must be notified, by a particular assignment of breaches, wherefore the action is brought against him, such a bond is not to be considered as a bond for the payment of money, under the act in question.

To test the bond, before us, by this criterion. It is a bond to be defeazanced, if the obligor shall survey the land by a certain time, and refund or rebate money, as the case may be, if the obligee should be found to be injured by the interference of other surveys. It is a bond whereby the obligor covenants, both to survey, by a certain time, and to make good the deficiency, if any. The obligee has his action against him for the failure of one or the other; and this observation, it is supposed, is decisive of its not being a bond, for the payment of money, only. It is a bond nei-

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ther single, nor to be defeasanced by the payment of a lesser certain sum, called the principal; bond, in which, a particular assignment of breaches is absolutely necessary; and, as to which, no judgment can be given, without the intervention of a jury, ascertaining the damages sustained, by the obligee.

Is this bond, therefore, to be considered, as a bond for payment of money, in the face of those prominent distinctions, which I have just mentioned?

It is said to be such a bond, because money is to be paid, in the event of a deficiency of the land; and that mathematics and arithmetic may render the sum to be paid absolutely certain. But my answer is, that this differs from the common case of a general covenant to make good a deficiency, only in this, that here the parties, by previous agreement, have given a rule to the jury in assessing damages if any; but that, except in this particular, the case is the common case of a bond, for the performance of covenants, in every respect. The only difference is, that here an arbitrary assessment of damages is prevented, by the consent of the parties, and the general power of juries, in respect to damages, is in this instance abridged; as it was in the case of *Lowe vs Peers* 4. Burr. 2229. Where it was agreed by Peers, that if he did not marry Lowe, that he would pay her £ 1000: And it was held that the jury, in ascertaining damages, would be confined to the £ 1000 as the precise sum fixed and ascertained, by the parties.

Mr. Wickham likens the case, to that of a bond conditioned to pay £ 1000, but attended with an agreement, that it shall be liable to be affected, by the real state of the accounts, between the two parties. To which I answer, that there is no similitude between the cases; for such a bond, as that, would fall, strictly, within the description

[of

of bonds, for payment of money, as to the manner of declaring and the nature of the judgment to be given. Although, in consequence of the agreement entered into, it may happen, that nothing may be really due them.

Upon the whole, I am clearly of opinion; that the present is not an assignable bond, within the meaning of the act of Assembly.

This view of the case precludes the necessity of my considering the legality of the assignment of breaches; although my present opinion is, that they are insufficiently assigned.

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K N O X

against

G A R L A N D.

GARLAND brought an action on the case in the District Court against Knox. The declaration contained 3 counts 1. For goods, wares and merchandizes sold and delivered. 2 A *quantum valebat* for goods, wares and merchandizes sold and delivered. 3. For money had and received to the plaintiffs use. Plea *non assumpsit*; and issue. Upon the trial the defendant filed the following demurrer to the evidence. Memorandum, that upon the trial of the issue in this cause, the plaintiff to maintain the issue on his part, produced

[If the demurrer to evidence shews that the plaintiff ought not to recover, the court cannot set it aside and award a new trial, but ought to enter judgment for the defendant,

Where the plaintiff's evidence is not doubtful and uncertain but defective only, the defendant may demur.

In such a case, if the Court does set

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aside the demurrer and award a new trial, the defendant may appeal.

And if the defendant offers to appeal and the court refuses it, this court will reverse the judgment notwithstanding there was a continuance by consent at a subsequent term, and after that a verdict and judgment for the plaintiff.

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duced four papers purporting to be public securities in these words.

£ 12: 10: 3 specie.

Commissioners office June 15th 1783.

Sir,

Pay to Nathaniel Harrison the sum of twelve pounds ten shillings and three pence specie for beef and corn furnished com. pro. law, in Buckingham as per certificate allowed by the court of claims in the said county.

M. CARRINGTON.

SAMUEL JONES.

Mr. Treasurer,

Forged.

Endorsed

Treasury 5th March, 1792.

There is no mention of any such certificate as the within, in the returns made to this office by the commissioners, and therefore it is pronounced a counterfeit.

J. AMBLER.

£ 5: 10. Specie.

Commissioners office June 12, 1783.

Sir,

Pay to John Clopton the sum of five pounds ten shillings specie for beef furnished the Com. pro. law in Augusta, as per certificate allowed by the court of claims in the said county.

M. CARRINGTON.

SAMUEL JONES.

Mr. Treasurer

Forged

Endorsed Treasury 5, March 1792.

There is no mention of any such certificate as the within in the returns made to this office by the commissioners, and therefore it is pronounced a counterfeit.

J. AMBLER.

£ 4: 14. Specie.

Commissioners

Commissioners office June 9th 1783.

Sir,

Pay to Edward Oldham the sum of four pounds fourteen shillings specie for beef furnished the Com. pro. law, in Berkeley, as per certificate allowed by the court of claims in the said county.

M. CARRINGTON.

SAMUEL JONES.

Mr. Treasurer.

Forged

Knox  
vs  
Garland.

Endorsed Treasury 5 March 1792.

There is no mention of any such certificate as the within in the returns made to this office by the commissioners, and therefore it is pronounced a counterfeit.

J. AMBLER.

£ 140 Specie.

Commissioners office July 17, 1783.

Sir,

Pay to James Knight the sum of one hundred and forty pounds specie for a waggon and four horses furnished the Com. pro. law. in Augusta as per certificate allowed by the court of claims in the said county.

M. CARRINGTON.

SAMUEL JONES.

Mr. Treasurer.

Forged.

Endorsed Treasury 5th, of March 1792.

There is no mention of any such certificate, as the within in the returns made to this office by the commissioners, and therefore it is pronounced a counterfeit.

J. AMBLER.

He also offered in evidence to the jury an endorsement on each of the said papers and on the face of each of the said papers the word forged, which were proved to be the hand writing of Jaquelin

Know  
vs  
Garlands

quelin Ambler the treasurer of this Commonwealth, and to have been written in consequence of the said certificates being presented at the treasury office of the Commonwealth after the plaintiff bought them. The plaintiff also proved by John Wilder, that he John Wilder lived in the store of the defendant in the month of April 1790, and bought a paper of one Jesse Woodward which purported to be a public certificate signed by Mayo Carrington and Samuel Jones as commissioners for £ 140 for a waggon and horses, which he afterwards sold on account of the defendant to the plaintiff but put no mark on it by which he can know it to be the same that he sold to said plaintiff; neither does he know if either of those now produced is the same. That he the said Wilder acting for the defendant, also sold to the plaintiff three or four other certificates of the said description, all of which amounted to one hundred and sixty four pounds and some shillings, for which he was paid at the rate of  $\frac{5}{6}$  in the pound, by the plaintiff. That he does not know whether any of the said certificates so sold as last aforesaid, are either of the said papers now produced. The defendant then proved by said Wilder that before he bought the said certificate of £ 140 of Woodward, he applied to William Haxall to know if the same was counterfeit. That the plaintiff was there at the time. That Haxall gave it as his opinion that the same was not counterfeit. That the plaintiff on the same day, and before he bought the last mentioned certificate told the deponent that he the plaintiff would give  $\frac{5}{6}$  per pound to the deponent for the same if the deponent bought it. That after the deponent had bought it, which was on the same day aforesaid the plaintiff did apply on that day, once or twice to deponent, to know if he would sell it him for  $\frac{5}{6}$ . That he did afterwards sell it to the plaintiff for the sum of  $\frac{5}{6}$  in the pound, and received the purchase money accordingly, and this being all the evidence which the plaintiff and defendant offered to the jury,

the

the defendant demurs to the same as insufficient in law to maintain the plaintiffs action, and says that he is not, neither is he bound by the law of the land to make any further or other answer thereto, and this he is ready to verify: Wherefore he prays judgment and his costs in his behalf expended to be adjudged to him. And the plaintiff doth aver that the same evidence is sufficient in law to maintain his said action and prays judgment and his damages aforesaid to be adjudged to him together with his costs about his suit in this behalf expended.

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The District Court overruled the demurrer to the evidence; and setting aside the verdict and proceedings subsequent to the issue, awarded a new trial. The record then states, that the defendant prayed an appeal; *which the court refused to grant, because as yet they have rendered no final judgment in this cause.* At a subsequent court, the suit was continued, *by consent of parties.* And at a future court, the record proceeds thus, "This day came the parties by their attorneys, and thereupon came also a jury &c. who being elected &c. say that the defendant did assume upon himself in manner and form as the plaintiff against him hath declared, and they do assess the plaintiffs damages by occasion of the non performance of that assumption to sixty three pounds six shillings, besides his costs." Therefore it is considered by the court that the plaintiff recover against the defendant his damages aforesaid, in form aforesaid assessed, and his costs by him about his suit in this behalf expended, and the said defendant in mercy &c.

To this judgment the defendant obtained a writ of *supersedeas* from this court.

CALL for the plaintiff in the *supersedeas*. Contended;

I. That the District Court erred in overruling the demurrer and awarding a new trial, as the demurrer clearly disclosed a sufficient bar to the plaintiffs action.

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For the plaintiff did not shew, that the papers were forged. His only evidence, as to that, is that he applied to the Treasurer; and he has neither summoned the commissioners, or taken the common precaution of applying at the Auditors office. He has therefore precipitated his case, without the proofs necessary to support his action. Besides Knox was an innocent purchaser, in the fair course of his business, of the papers in question, and therefore he is not liable to refund the money, which he afterwards sold them to the defendant for, without any knowledge of their being counterfeit. *Price vs Neal*, 3. Burr: 1354. The reasoning of Lord Mansfield, in which case, expressly applies to that before the court. For whatever neglect there was, in the present case, was upon the side of Garland; as the defendant had actual incouragement from him, and *bona fide* paid the whole value to Woodward. So that it is a misfortune which has happened, without the defendants fault or neglect, but if there be any fault or negligence, it was on the part of the plaintiff as already observed. Consequently, there is no reason for throwing off the loss from *one innocent man*, upon *another innocent man*.

2. That the demurrer to evidence was a proper mode of bringing the case before the court.

Whenever the plaintiffs evidence does not maintain his action, the defendant may demur and refer it to the court to decide whether the plaintiff can recover or not. For he is not obliged to risque the law of his case with the jury, but has a right to draw it *ad aliud examen* *Cocksedge vs Fansbaw*. Dougl. 114. *Stephens vs White*, 2. Wash. 230. The demurrer therefore ought to have been sustained, and judgment entered on it in favour of the defendant in the court below.

3. That the subsequent proceedings make no difference, and were no waiver of the defendants right.

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For the defendant offered to appeal; and as he had a sufficient case upon the record to entitle him to judgment, the refusal of the District Court to allow the appeal ought not to prejudice him; and all the subsequent proceedings, there, ought to be considered as *in invitum*. Of course no inference from thence is to be drawn against him.

**M'CRAW contra.** The justice and law of the case are both in favour of the plaintiff in the court below; for whenever a man has paid money to another upon a consideration, which happens to fail, he is entitled to recover it back in an action for money *had and received*. But the demurrer to evidence was clearly improper. For the defendant, thereby, prevented the jury from inferring, from the evidence, the very facts, which his counsel now insists were not proved. But this he could not do; for he was bound either to have admitted the facts, or suffered the cause to have remained with the jury. *Bull. nis: pr: 313*. Besides the defendant has, by his subsequent conduct, waived the objection. For, at a succeeding term, he consented to a continuance of the cause; and finally went into the second trial, without taking any exception. He ought not, therefore, to be allowed to do it now. If, contrary to what is the fact, the evidence stated in the demurrer was insufficient to have enabled the jury to make the necessary inferences, the presumption is, that every essential proof was supplied upon the second trial.

**CALL in reply.** There is nothing, which, *ex quo et bono*, entitles the plaintiff to recover of the defendant; who was an innocent person, acting in the regular course of his business, and guilty of no fault. Whether the defendant was liable or not, was a question of law proper for the consideration of the court, and not of the jury. The demurrer therefore, was, clearly, proper. For the jury could not have made any such inferences from the evidence, as is contended for, on the other side. There was nothing in the testimony

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mony which inevitably led to such conclusions. But the inferences ought to be inevitable, or the jury can, no more, make them, than the court; and, where they are inevitable, the court may, as well, make them, as the jury. This is the spirit of the decisions in *Cocksedge vs Fanshawe* and *Stephens vs White*. No waiver ought to be presumed. Because the defendant offered to appeal, which operated like a bill of exceptions. The defendant was obliged to submit to the second trial; for the authority of the court, in awarding it, could not be resisted, as they would not allow his appeal, but obliged him to remain where he was. It is no answer to say, that the defendant ought to have made another exception at the second trial. For it would have been nugatory and disrespectful, to the District Court, to have presented the same demurrer again. Besides, the parties would, by that means, have forever run round in a circle; and the cause could never have been ended.

*Per: Cur:* The court is of opinion, that the judgment of the District Court is erroneous, in this. That they overruled the demurrer to evidence, after it had been joined by the parties, and set aside the proceedings, in the cause, subsequent to the issue, without the consent of the parties: 'Although the evidence on the part of Garland was fully set forth in the demurrer; and there does not appear to be any thing uncertain or doubtful in the evidence, so set forth, to prevent the court, from determining the sufficiency thereof, to maintain the issue joined. Therefore the judgment and proceedings, subsequent to the first verdict, are to be reversed and annulled, with costs: And this court, proceeding to give such judgment as the District Court ought to have given, is of opinion, that the evidence, stated in the demurrer, is not sufficient, in law, to maintain the issue joined on the part of Garland; but Knox is to go thereof, without day, and to recover his costs in that court also.

GRAHAM

G R A H A M  
*against*  
 W O O D S O N,

**T**HIS was an appeal from a decree of the High Court of Chancery. Where Josiah Woodson and wife and others brought a bill against Graham and Philip Woodson. Stating, that Mathew Woodson leased to Graham some coal mines in Goochland for the term of 20 years; in which lease there is a proviso, that if Graham should think fit to surrender the lease before the expiration of the term he should have liberty to do so on paying the sum of five shillings. That this lease was made for the sole object of providing more competently for the lessors daughters; and was subsisting at the death of Mathew Woodson; who devised the same, or, which is the same thing, the money's arising therefrom to his daughters the plaintiffs. That the defendant P. Woodson being entitled by devise from the said M. Woodson to the reversion of the said coal mines, after the expiration of Graham's lease, the said Graham, after the death of Mathew Woodson, purchased the said reversionary interest; and thereupon surrendered the lease, and gave notice thereof to the executrix and devisees aforesaid of Mathew Woodson. That this was done by Graham to obtain the land for less than its value. That by this means the rights of the plaintiffs will be defeated, if the surrender should be allowed to prevail against them; which they insist it ought not, as the plaintiffs are entitled either to the money, or to the unexpired term of years in the land itself. The bill therefore prays an account and payment of the rent till the regular expiration of the lease by efflux of time; or otherwise, that he may deliver possession of the lands to the plaintiff during the residue of the term for which the lease was granted, and for general relief.

H 2

The

**A** leases to **B** for 20 years; with liberty to **B** of surrendering the lease at any time before on payment of 5 shillings. **A** devises the rents during the lease to his five daughters and the eldest simple afterwards to his son **P** who sells to **A** who surrenders the lease; this surrender shall not dis-appoint the daughters legacies; but **A** will be decreed to pay the rents.

Interest allowed upon arrearage of rents, upon circumstances



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*vs*  
 Woodson.

The answer of Graham, admits the lease, and devise. Insists upon his right to surrender under the express words of the lease; and that is was on account of the right to do so, that he had agreed to give so high a rent. That the lease being defeasible in its nature, those claiming the benefits, were subject to the disadvantages of it. That the uncertainty, of its duration, was frequently spoken of in conversations between the defendant and the said M. Woodson. That after searching for coal for some time without any competent success, the defendant in the life-time of the said M. Woodson had determined to annul the lease, unless he should in a short time find a body of coal which promised more. That things were in this state when the said M. Woodson died; and in a short time afterwards the apprehensions of the lease being ruinous to him increasing, he determined to abandon, when he was informed that the defendant P. Woodson would sell, and conceiving that a purchase would be the best means of recovering his expenditures already made upon the lease, he bought the fee simple. That this circumstance induced him to make greater exertions in seeking for coal; which after great expence he hath at length found in such a degree as to promise success. Yet notwithstanding these prospects he is willing to relinquish his interest in the coal lands, on receiving his expenditures without interest, and a reasonable hire for the slaves which have been employed on them.

The answer of Woodson says, Graham during the treaty for the reversion, frequently told him, he would give up the lease to his sisters so as to prevent the defendant from receiving any benefit from it. That he sold his right to Graham, without any intention of defrauding the plaintiffs.

The depositions prove M. Woodson's intention of providing for his daughters by the lease. That Graham when he bought the fee simple, secured £ 100 each to the two youngest daughters if they were

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*vs*  
 Woodson.

were satisfied. And one of the witnesses says, that after the purchase, Graham, in a conversation, said to the defendant Philip, that if he had thrown up the lease, he should have done it in favour of the legatees, and not of Philip, as that seemed to be his fathers will.

The Court of Chancery decreed the defendant Graham to pay the rents with interest, and if he should chuse afterwards to abandon the lease, to deliver the possession of the lands during the unexpired term thereof to the plaintiffs. From which decree Graham appealed to this court.

CALL and WICKHAM for the appellants. In-  
 sisted, *that* it was like the case of a specific devise;  
 the devisee of which is liable to all the casualties,  
 which may attend the thing bequeathed. Thus,  
 if there be a devise of a debt, and the debtor be-  
 comes insolvent or the testator releases the debt,  
 the legatee loses it altogether, and cannot claim  
 satisfaction out of the other estate of the testator.  
 That the lease in the present case was in its cre-  
 ation liable to be surrendered, and therefore if  
 the testator did not make provision for that event  
 he meant that the interest of the daughters should  
 depend upon the contingency in the lease and de-  
 termine with it, if the lease should be surrendered.  
 Consequently the daughters could no more claim  
 compensation for the loss in this case, than the  
 legatee of a debt could in the other. That the  
 contingency of the surrender was a benefit which  
 belonged to the remainderman; and, if fortune  
 threw it in his way, the daughters could not com-  
 plain; because they had the devise as the testator  
 gave it to them. For he bequeathed it subject to  
 be destroyed at the election of the lessee, who was  
 at liberty to exercise the right, when he pleased;  
 and the daughters had no authority to controul  
 him, because the lease itself expressly bestowed  
 the power on him. *That* it was strange reasoning  
 to say, that the daughters were injured by the les-  
 see's exercising a right which he had over the es-  
 tate, and which right he had stipulated for in ex-  
 press

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*vs*  
 Woodson.

prefs terms. Consequently the principles of the decree were wholly erroneous, and the bill ~~should~~ have been dismissed.

But if it were true, that the plaintiffs were entitled to the rents, which they by no means admitted, still the decree for interest was clearly wrong; because that is never given on rents unless there be a penalty. 2. *Vez. jr.* 163. *Cas. Temp. Talb.* 2.

RANDOLPH *contra*. Contended, *that* the surrender was a stratagem to defeat the interest of the daughters which would not be supported in a Court of Equity; because they were not to be ousted of their rights by a contrivance between the lessee and remainderman. *That* there was less reason for it, in this case, than in others: because the defendant had in fact bought the estate himself before the surrender; which was a device, afterwards, made use of to defeat the legacies of the daughters; although their claim had enabled him to buy the remainder, at an under rate. *That* a devise of the rents, and a devise of the term itself, were substantially the same; and the true exposition of the will was, that he intended them to have the emoluments of the land, during the term of the lease. *That* therefore the change of owners would not affect their interest. For whether the possession of the land was with the remainderman or the lessee, their claim was still the same. So that if the remainderman had retained the lands, he would after the surrender, have been liable for the rents, or else he must have yielded possession to the daughters; and therefore the defendant who had less equity must do the same. *That* the rents being for a liquidated sum, ought to carry interest; for the uncertainty of the amount is the only reason why interest is not generally allowed.

*Cur. adv. vult:*

LYONS Judge. Delivered the resolution of the Court, that there was no error in the decree upon the merits; and as to the interest that it was discretionary

discretionary in the Court to allow it or not. But in this case the defendant had no title to have it taken off, as he had endeavoured to defeat the rents altogether, and thereby delayed the payment.

Graham  
vs.  
Woodson.

Decree affirmed.

## SKIPWITH

against

## CLINCH.

**T**HIS was an appeal from a decree of the High Court of Chancery. Where Clinch as executor of Holt together with the children of Holt brought a bill against Skipwith stating, that on the 23d of May 1777 Skipwith leased of Holt an estate for twenty years at £150 *per annum*, with a proviso for payment of the further sum of £50 *per annum* provided there should be peace between G. Britain and America, the said £50 to commence with the peace. That another lease was afterwards executed between the said parties, in every respect like the former, except that the latter is dated on the 31st of August 1778 instead of the 23d of May 1777. That the only reason for executing the second lease was, that the first had not been recorded. That the plaintiffs can prove that *specie* and not *paper money* was contemplated in the said lease. The bill states the plaintiffs rights to the rents under the lease; the deed for which it states to have been lost. And prays that the defendant may be compelled to pay the rents and perform the other covenants in the lease, and for general relief.

A takes a lease of B in May '77 for 21 years. In August 1778 a similar lease of the same estate is executed. The rents are to be settled by the scale of May 1777.

Interest upon the rents refused.

The answer admits the two leases; but states that the second was a new contract, as there had been

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been a misunderstanding between the parties relative to the first. Denies that it was a *specie* contract: and says it would not have been worth above a fourth or third of the nominal rent, had it been payable in specie. States that the taxes, owing to the unjust valuation of the land by the commissioners, are excessively high, with other circumstances and difficulties, which have attended the contract.

The deposition of a witness states, that Skipwith informed him there was a lease of a date prior to that of August 1778, but that the last had been executed at the particular request of Holt; although there was very little variance between them.

Another witness says, he understood from all he could learn from either party, that the rent was to be paid in *specie*, or (what he understood by that expression) *good money*.

Another witness says he witnessed the original lease, which he has lately seen; and at the bottom was a note in the hand writing of Holt as the deponent was informed, in these words, "This lease renewed the 31st of August 1778," but that the deponent, knows nothing of the last mentioned lease.

Another witness says the plaintiff Clinch told him that the defendant had paid Holt the first years rent in *paper money*, as appeared by Holt's books; and that he believed the reason why he did not annually pay it, to have been because Holt would not receive it.

Another witness says he lived with the defendant in 1778 and wrote the last lease, which he attested as a witness.

The two deeds appear to be the same, except as to their dates.

The Court of Chancery was of opinion, that the rents were payable according to the value of money



money at the date of the first lease, and that the plaintiffs were entitled to the same benefits under the last lease as if it had been executed on the date of the first. That court therefore decreed, the defendant to pay to the plaintiffs, £ 300 of the present current money of Virginia, for the arrearages of the rents on the 1st of January 1784, (taken for the date of the peace;) and £ 1044 of like money for the arrearages to the 1st of January 1797, with liberty to sue writs of *scire facias* from time to time to recover future arrears, and that upon all trials at law the defendant should admit the deed of the 31st of August 1778 to be of like force, as if executed in May 1777. From which decree Skipwith appealed to this court. And the plaintiff likewise petitioned for an appeal, because the court had scaled the rents instead of decreeing them in specie; and because interest was not allowed upon the rents.

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Clinch.

RANDOLPH for the appellant. There is no pretext for considering this as a specie contract; as there is in fact nothing to shew that it was meditated by the parties, and the answer denies that it was a specie contract. The true way is to consider it as a contract of the date of the last deed, and subject to the scale of that period. That is the only legal notion, and the circumstances lead to a belief that the parties intended it as a new substantive contract of that date. Consequently the depreciation is to be settled by the scale at that time; and none of the cases in this court are against us. *Pleasants vs Bibb*. 1 Wash. 8. is rather in our favor; because the principle which it establishes is, that you cannot antedate the period of depreciation, unless there is something upon the face of the instrument to authorize it; but here there is nothing. The same doctrine was held by the court in stronger and more explicit language in *Bogle Somerville & co. vs Vowles*; \* and there, evidence of the date of the original contract was actually

\* 1. Call's Rep. p. 244.

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tually refused. Which was an express determination in the very point contended for by us; because there is nothing particular in our case to take it out of the common rule. Finally the principles laid down by the Court in *Watson vs Alexander*, \* instead of militating against the position we contend for, will on due examination, be found to be consistent with it. Interest was properly disallowed by the Court of Chancery under all the circumstances of the case; for the full value of the rent was agreed to be given, had there been no change in the property; and in event it has proved a very hard bargain.

**WICKHAM contra.** The stile of the last deed evidently shews that the drawer had the first before him; and that the latter was intended merely as a renewal of the first, the time for recording of which had expired. Consequently *Pleasants vs Bibb*. 1. *Wash.* 8, cited by the appellants counsel operates against him, and in every point applies in our favor. For the last deed is for payment of rent from a day anterior to the date. The case of *Bogle Somerville & Co. vs Vowles* is very different from this, and cannot affect it; because there was nothing, in that case, to form a ground of enquiry into the date: for it was a naked case, unattended with circumstances. As to *Watson vs Alexander*, the spirit of that determination is clearly in our favor. Besides all those were cases at common law where more strictness obtains; but this is a case originating in the Court of Chancery, and therefore to be governed by the principles of Equity. At the least we are entitled to the value of the money at the date of the first deed. But there is strong ground to infer that specie was intended by the parties; for the lease was a long one, and probably to last beyond the period of the war: and at the close of that the rent was to be increased. All which circumstances lead to a belief that specie was the object of the parties.

Interest

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\* 1. Washington's Rep. 340

Interest ought to be allowed upon the rents; because they were liquidated and certain; in which case, and especially where there have been long delays, interest has been given. 1. *Wms.* 542. 2. *Veaz.* 170. 3. *Alk.* 579. 2. *Wms.* 163.

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RANDOLPH in reply. *Pleasants vs Bibb* was fully considered in *Bogle Somerville and company vs Vowles*; which makes the authority of the latter more conclusive. That those were cases at common law does not alter the rule; because the act makes no difference between a Court of Law and a Court of Equity in this respect. On the contrary it gives equal power to both Courts to decide according to Equity. The circumstances of this case are particularly hard; and therefore interest ought not to be allowed.

*Cur. adv. vult:*

LYONS Judge, Delivered the resolution of the Court, that there was no error in the decree in establishing the date of the contract; and as to the interest that the plaintiffs were not entitled to it. Because if it was certain they might have distrained, and therefore should not have lain by and suffered the interest to accumulate; and if it was uncertain (as they themselves plainly shewed it was, by contending, at one time, that it was specie, and at another, that the lease was to be considered as of a different date from that admitted by the defendant, and therefore they did not venture to distrain) then, according to the very cases relied on by the plaintiff's counsel, interest was not demandable. Nor ought the plaintiffs to have interest from the time of the decree; because they had themselves appealed as well as Skipwith, and therefore contributed to rendering the amount uncertain and undetermined still.

Decree affirmed.

TALIAFERRO

I 2



## T A L I A F E R R O

*against*

ROBB and AL. ex'rs of GILCHRIST.

What an insufficient averment in a declaration.

What a sufficient consideration to support an assumpsit.

A executor of B. writes to C. a creditor of B, that as soon as he is able to dispose of his crops he will pay the claim, or will let him have any property in his possession at a moderate valuation, this will not bind A in his own right without an averment of assets, or a forbearance to sue, or of some other consideration.

THE executors of Robert Gilchrist brought an action on the case in the District Court against Taliaferro, and declared for this to wit, "That whereas John Taliaferro deceased, in his life-time, to wit, on the 17th day of June 1787, by his certain writing obligatory sealed with his seal, did acknowledge himself to be held and firmly bound unto James Robb in the sum of three hundred and thirty pounds fourteen shillings and four pence, conditioned to pay the sum of £ 165 : 7 : 2 on or before the first day of January then next ensuing, which said writing obligatory was afterwards assigned by the said James Robb to the said Robert Gilchrist, and the said John Taliaferro departed this life without discharging the said debt, and the said John Taliaferro junior sued out administration on his estate, and so having the administration made a certain note or letter in writing addressed to the said Robert Gilchrist, which said letter is in the words and figures following, "Sir, I received your letter and am sorry that it is not in my power to discharge my fathers bond in your possession, nor can I, as the uncertainty of collection is so great, fix on any final adjustment with punctuality, I have by me a considerable quantity of Indian corn and the expectation of a fine crop of wheat, so soon as I shall be able to dispose of either of these crops you may rely on the payment of a great part, if not the whole of your claim, or should any other property in my possession suit you, I will readily accommodate you with it at a moderate valuation, hoping that you will take into consideration the difficulty of the times, I am Sir your obedient

servant.

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Robb,

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"servant. John Taliaferro jr. Hays 16th January 1790." And the said plaintiffs aver that the "bond above mentioned and to the court now "produced was then in the possession of the said "Robert, and that no other bond of the said John "Taliaferro's deceased, was at that time in his "possession; and they moreover aver, that the "said John Taliaferro was afterwards able to sell "his crop of Indian corn and wheat, by reason of "all which premises the said John Taliaferro jr. "became liable to pay to the said Robert Gilchrist all or a great part of the money due on "said bond, and being so liable, he the said John "Taliaferro jr. afterwards to wit, on the day "of 1790 in consideration thereof undertook "and then and there faithfully promised to pay "the same to the said Robert Gilchrist whenever "he should be thereto afterwards required. Yet "the said John Taliaferro jr. although often required hath not yet paid all or any part of said "bond to the said Robert Gilchrist in his life-time "or to the said executors or either of them since "his death, but hitherto to pay the same hath refused, and still doth refuse to the damage of the "said plaintiffs £ 240, and therefore they bring "suit &c."

Plea *non assumpsit* and issue. Verdict for the plaintiff for £ 217: 14: 5. The defendant moved to arrest the judgment for the following reasons, "For that the only evidence given in the said "cause is the letter recited in the plaintiffs declaration, and no legal consideration to found "an assumpsit on the part of the defendant either "to the plaintiffs testator, or to the said plaintiff "is stated, as appears in the said declaration." The District Court gave judgment in favour of the plaintiffs; and the defendant appealed to this court.

WICKHAM for the appellant. This is a new attempt to charge an executor, out of his own estate. The letter is in the usual stile of a letter from

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from an executor to a creditor of the testators estate; and there is nothing to shew, that he meant to bind himself personally. No part of it contains any actual *assumpsit* in his own right; for as to the propositions, concerning the sale of the corn and the event of the crop, they at most only mean, that he would apply as much of his own money as the amount of the assets, which probably would not, so speedily, have commanded money. But if more was thereby intended, they were offers which do not appear to have been accepted; and therefore are not obligatory. For if an executor offers to pay a debt, it does not oblige him, unless there be some new consideration; as forbearance, or assets, or something else of that kind. But, here, there does not appear to have been any new consideration, at all: for it is not alledged, in the declaration, that there was a forbearance in consequence of the offers; or that the defendant had assets sufficient to pay; or any other consideration to support the promise, which was therefore a mere *nudum pactum*. But the averment is wholly insufficient, both as to the sum and the proportion of the crop, for which the defendant was liable. For the declaration does not state the sum certainly, or the amount and proportion of the crop, for which the defendant was liable; but the averment is, only, that the defendant was liable for the whole or a great part; and the *assumpsit*, which is in the words of the averment, is just as uncertain; and therefore void.

WARDEN *contra*. The letter contains a clear *assumpsit*; for it is as soon as the corn is sold, or the crop should come in; and when he speaks of difficulties, it is a plain solicitation, that Gilchrist would not distress him with a suit, and is tantamount to a request of forbearance, which was a good consideration. *Pow. contr.* 354. It was in fact a clear acknowledgment of his obligation to pay. *Cowp.* 289, is a strong authority in our favor; for the letter here amounted to an admission of assets; and that according to the case in

in *Cowper*, was a good foundation for an assumpsit. The averment, in the declaration, is sufficient; for it is, in consideration of all the preceding matters, which had been stated, that the defendant is said to have assumed. Therefore if any of the uncertainties, insisted on by the opposite counsel, do in fact exist, they may be rejected as surplusage, and the proper foundations of the *assumpsit* only relied on.

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RANDOLPH on the same side. There was probably other evidence in the cause, and after verdict the Court will intend that every thing necessary to support the action was proved. No set words are necessary to constitute an assumpsit; but if the whole spirit of the agreement amounts to it, that is sufficient. The object of the letter plainly was, to obtain forbearance; and by assuring Gilchrist that the debt was ultimately safe, to obtain it. Therefore, if there was any design at bottom it will not avail the defendant, who should be bound by the terms held out in the letter. The uncertainty of the time, when the corn would be sold, or the crop would be reaped, necessarily proves that he was soliciting forbearance; because Gilchrist, in waiting for either, was inevitably to be delayed. But forbearance was itself a sufficient consideration, and therefore the promise was obligatory. The averment is sufficient. For the offer was accepted by the defendants waiting for, and betaking himself to the fund proposed, which rendered a more explicit averment unnecessary. But there was no occasion, for any particular consideration to be alledged, in the present case; because he assumpsit was in writing; which superceded the necessity of averring or proving any particular consideration. 3 Burr 1670. For where there is a written agreement, the defendant should shew that there was no consideration; and it is not necessary for the plaintiff to prove there was. If the executor acknowledges he has effects enough to pay, it is sufficient to support an assumpsit, *Cowper* 234; and here the letter was tantamount; for no other

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other inference could be drawn from it. The letter was written with a knowledge of the testator's estate, and that is sufficient to oblige him; especially as it is in writing, 1. *Vez.* 124. The averment is in the terms of the contract; which is all that was requisite. For the certainty was to be made out in evidence; and, as before observed, it is to be presumed, that it was done, as the jury could not have found the verdict without.

**WICKHAM** in reply. The last argument would support every declaration, however defective; and is expressly repugnant to *Chichester vs Vass*\* in this court; which established that the court can only infer what is made absolutely necessary to be proved by the declaration. The letter only amounted to an offer, and not to a promise. The forbearance should be stated, as general, or for a particular period. *Pow. Contr.* 354: but here neither is averred. The case in *Cowper* is of the first impression; and carries the doctrine farther, than good sense warrants. Unless the contrary is expressly shewn, an executor is always considered, as promising in his fiduciary character.

If the plaintiff proceeded on the idea of an admission of assets, he should have averred it. The uncertainties which I spoke of before, cannot be rejected as surplusage; and the truth is, there was no promise made. If the plaintiff had averred forbearance, assets, &c. we might have traversed it; but, as it is, we could not come prepared to controvert his evidence, on those points, which we could not foresee he would endeavour to establish. The plaintiff should have alledged the price the corn sold for, or the amount of the crop; for the averment, in the words of the letter is not enough; but he should, as he might have done, have alledged it with certainty. That the offer was in writing makes no difference; for the passage from *Burr*: is the solitary opinion of a single judge,

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\* 1 Call's Reports p. 83.

judge, and a like position is to found no where else. *Pow. Contr.* 334, shews that if you declare in an action on the case upon a note of hand, and do not allege a consideration it is *nudum pactum*. The case in *1. Vez.* instead of being against us, is, in fact, for us; because it is there said that the defendant was liable in his fiduciary character.

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vs  
Robb.

*Cur. adv. vult.*

LYONS Judge. Delivered the resolution of the court, that, in order to render the defendant liable, it ought to have been averred, in the declaration, that the defendant had assets, or that the plaintiff forbore, or that there was some other consideration. But this having been omitted, that the judgment was erroneous, and to be reversed; and judgment on the verdict arrested, on account of the insufficiency of the declaration.

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W A R E

*against*

C A R Y.

**I**N ejectment brought by Ware against Cary in the District Court the jury found the following special verdict. "We find that on the 19th day of June 1744 Judith Ware purchased of Thomas Walton 200 acres of land lying on the south side of the Fluvanna river opposite the seven Islands, for forty pounds, by a deed of bargain and sale, indented and recorded in Goochland County Court on the 21st of August 1744, with a memorandum of livery and seizen thereon endorsed which appears in these words, this indenture, &c. (setting forth.)

Deed in which an estate for life is given the husband, made by husband and wife of the wives lands to a trustee, will pass the estate although no consideration be expressed there in.—Particularly if the verdict finds that it was for the purpose of settling it in the wives family.

We

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vs.  
Cary.

We find that the said land then lay in the county of Goochland, but now in the county of Buckingham, within the jurisdiction of this court, and is the same land now in question:

We find, that, after the deed aforesaid, the said Judith Ware intermarried with Samuel Jordan. We find that the said Samuel Jordan and Judith his wife in order to settle in the family of the said Judith the said land, by their indenture of feoffment bearing date the 14th day of March 1781, conveyed the said land to John Nicholas his heirs and assigns in trust, for the purposes in the said deed expressed, which said deed of feoffment is in these words.

This indenture made this fourteenth day of March in the year of our Lord one thousand seven hundred and eighty one between Samuel Jordan of the county of Buckingham gentleman and Judith his wife of the one part and John Nicholas of the other part, whereas the said Samuel Jordan and the said Judith are seized in right of the said Judith of and in one certain tract of land conveyed by Thomas Walton to her the said Judith when sold by a certain deed recorded in the County Court of Goochland, containing two hundred acres more or less, lying and being on the south side of Fluvanna river in Buckingham county formerly Goochland, joining the lands of John Nicholas formerly the land of George Nicholas. This indenture therefore witnesseth that for settling the said land and to such uses and in such manner as is hereafter in these presents expressed and declared and for enabling the said Judith to dispose of and grant the said land and premises in such manner and form, and according to the power and authority to her hereafter in these presents reserved, and for other good causes and considerations them the said Samuel Jordan and Judith his wife thereunto moving, they the said Samuel Jordan and Judith his wife do give, grant, alien, enfeoff and confirm unto the said John Nicholas his heirs

and

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and assigns the said tract of land and premises with the appurtenances thereunto belonging, *To have and to hold* the said tract of land and premises with the appurtenances unto the said John Nicholas his heirs and assigns forever, to the uses and purposes hereafter in these presents expressed and declared; that is to say, to the use of the said Samuel Jordan and Judith his wife for and during the term of the natural lives of the said Samuel and Judith without impeachment of waste and after the death of the said Samuel Jordan and Judith his wife to the use and behoof of such person as the said Judith by her last will and testament in writing by her to be subscribed with her own hand and sealed with her seal in presence of two or more witnesses, or by any other writing to be by her subscribed and sealed in presence of three or more witnesses, shall nominate declare and appoint, upon this hope, trust and confidence that the said John Nicholas his heirs and assigns after the ending of the estate of the said Samuel Jordan and Judith his wife of and in the said land and premises to them above limited, make such conveyance and dispose of the same to such person in such manner as the said Judith by her last will and testament, or by any other writing as afore-said shall appoint, and for and in default of such nomination or appointment, then that the said John Nicholas his heirs and assigns shall convey and assure the said land and premises to the right heirs of the said Judith forever. In witness whereof the said Samuel Jordan and Judith his wife have hereunto set their hands and seals the day and year above written.

SAMUEL JORDAN. [L. s.]

JUDITH JORDAN, [L. s.]

*In presence of*  
CHARLES ROSE,  
HENRY BELL,  
CHARLES MAY,  
JOHN NICHOLAS, junr.

K 2

With



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With a certificate of the record of the said deed in the County Court of Buckingham, which is in these words:

At a court held for Buckingham county the 9th day of April 1781.

This indenture was proved by the oath of Henry Bell one of the witnesses thereto, and at another court held for the said county the 8th day of October 1781. This indenture was further proved by the oath of John Nicholas junior another witness thereto, and at another court held for the said county the 12th day of August 1782. This indenture on the motion of John Nicholas was ordered to be recorded.

(Teste,) ROLFE ELDRIDGE. C. C.

*A copy, teste, ROLFE ELDRIDGE, c. c.*

We find that as the said Judith was under coverture a commission not directed to any person by name on the 14th of March 1781, was issued by the clerk of Buckingham in these words. Buckingham sc.—The Commonwealth of Virginia to gentlemen greeting: Whereas Samuel Jordan and Judith his wife by their certain indenture of feoffment bearing date the 14th day of March 1781, and hereto annexed, have sold and conveyed unto John Nicholas the fee simple estate of and in a certain tract or parcel of land, containing two hundred acres of land more or less lying and being in the county of Buckingham on the south side of Fluvanna river, and whereas the said Judith cannot conveniently travel to the said County Court of Buckingham to make acknowledgment of the said conveyance, you or any two of you are therefore commanded to go to the said Judith and receive her acknowledgment of the same, and examine her privily and apart from the said Samuel Jordan her husband, whether she doth the same freely and voluntarily without the persuasions or threats of her said husband, and whether she be willing that the same should be recorded.

ed in our said County Court, and when you have received her acknowledgment and examined her as aforesaid that you distinctly and plainly certify the same to the said County Court under your hands and seals sending then there the said indenture and this writ. Witness Rolfe Eldridge clerk of our said court at the courthouse the 14th day of March in the 5th year of the Commonwealth.

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### ROLFE ELDRIDGE.

And returned executed by Charles May and Henry Bell who were Justices of the peace at that time for the said county of Buckingham, and that a certificate of the execution of the said commission is in these words. Buckingham county to wit: By virtue of this commission hereunto annexed, we the subscribers have personally applied to the within named Judith Jordan, and have examined her privately and apart from the said Samuel Jordan her husband, do certify that she declares that she freely and voluntarily acknowledges the conveyances contained in the said indenture, which is hereto annexed, without the threats or persuasions of her husband, and that she is willing and desirous the same should be recorded in the County Court of Buckingham. Given under our hands and seals this fourteenth day of March one thousand seven hundred and eighty one, in the 5th year of the Commonwealth.

CHARLES MAY, [L. s.]

HENRY BELL. [L. s.]

Which with the commission appears to have been recorded in the said County Court by a certificate in these words.

At a court held for Buckingham county the 12th day of August 1782. This commission and the certificate of the execution thereof was returned and ordered to be recorded.—Teste, Rolfe Eldridge, c. c.—A copy, teste, Rolfe Eldridge, c. c.

We

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vs.  
Cary.

We find that Samuel Jordan and Judith his wife by a deed poll dated the                      day of 1785, did appoint that the said John Nicholas his heirs and assigns should convey the said lands to Robert Cary and Judith his wife, and to the heirs of the said Judith in fee simple, which deed is in these words,

To all to whom these presents shall come we Samuel Jordan and Judith Jordan send greeting: Know ye that by virtue of the powers received to me the said Judith, by a certain indenture bearing date the fourteenth day of March one thousand seven hundred and eighty one between the said Samuel Jordan and myself of the one part and John Nicholas of the other part for conveying two hundred acres of land in the county of Buckingham in trust for such uses as I should declare and appoint, as by the said indenture may appear, and for the affection which I bear to my granddaughter Judith Cary wife of Robert Cary, I the said Judith Jordan with the consent of the said Samuel Jordan do nominate declare and appoint that the use of the said two hundred acres of land shall be to the said Robert Cary and Judith his wife, and to the heirs of the said Judith Cary forever, and for that purpose, do appoint that the said John Nicholas his heirs and assigns do convey the said land and premites to the said Robert Cary and Judith his wife in manner aforesaid, agreeable to the indenture aforesaid. In witness whereof we have hereunto set our hands and seals the                      day of                      one thousand seven hundred and eighty five.

JAMUEL JORDAN. (L. s.)

JUDITH JORDAN. (L. s.)

*Sealed and deliver- }  
ed in presence of }*

EDWARD WINSTON.—WILLIAM SIO CRAWFORD.—CHARLES ROSE.—THOMAS MILLER.—SAMUEL I. CABELL.—WILLIAM HONLEY.

And

And which was recorded in the said County Court as appears by a certificate in these words.

At a Court held for Buckingham county the 15th. day of March 1785, this indenture was proved by the oaths of Edward Winston and Thomas Miller two of the witnesses thereto, and at another Court held for the said County 11th day of October 1790, this indenture was proved by the oath of William Honley another witness thereto and ordered to be recorded.

(*Teste,*) ROLFE ELDRIDGE, c. c.

*A copy, teste,* ROLFE ELDRIDGE c. c.

We find that while the said Judith was under coverture with the said Samuel Jordan she after reciting the said second indenture of feoffment devised the said land to the said Judith Cary and her heirs and directed the said John Nicholas to convey it accordingly by her will: We find that the said Judith Cary was the granddaughter of the said Judith Jordan, and that the said Judith Cary died in the year 1788, survived by only one child a daughter from her body issuing, who died an infant of tender years in the year 1788, and that the defendant Robert Cary is the heir at law of the said infant daughter. We find that the said Judith Jordan died September or October 1765, and that her husband the said Samuel Jordan died in the year 1789: We find that the said Samuel and Judith Jordan from the time of their marriage to the time of their respective deaths were in possession of the said land.

We find that the defendant at this time is in possession of the said land. We find the lease entry and ouster in the declaration mentioned. We find that John Ware the lessor of the plaintiff is the only son and heir at law of the said Judith Jordan and if upon the whole of these facts the law be for the plaintiff, we find for the plaintiff the lands in the declaration mentioned, and assess

the

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the plaintiffs damages to one penny. But if the law be for the defendant then we find for the defendant."

The District Court gave judgment in favour of the defendant Cary; and Ware appealed to this Court.

WICKHAM for the appellant. The deed from Judith Jordan and her husband to Nicholas purports to be a feoffment; and as there is no livery of seizen, it passed no estate. *Co. Lit.* 56, (b.) Nor can it be taken as a conveyance upon the statute; because the parties appear to have clearly intended, that it should operate, as a common law conveyance. But it cannot operate as a statutory conveyance, for another reason; namely because there is not a sufficient consideration, there being neither money or blood expressed. For the finding of the jury that the deed was made, for the purpose of settling it in her family, does not supply the want of a consideration; especially as the plaintiff (who is the son) was as near and nearer in blood than the defendants wife, who was only the granddaughter of Mrs. Jordan. But another objection to the deed is, that the wife was not privily examined, as the act of 1748, requires. For the commission issued in *blank*, instead of being directed to Justices; and it does not appear, that it was sent to the county, in which Mrs. Jordan resided. But if there was a sufficient consideration and the wife had duly relinquished, still the defendants title would have been defective; because, by the deed, she had no power to convey a fee, but merely a life estate. For the deed does not give her power to convey the whole interest; but it merely gives her power to appoint to such persons, as she thinks proper, without naming any estate in particular; which in contemplation of law, only gave her power to convey an estate for life, to the appointee.

CALL *contra*. The finding of the jury, that Mrs. Jordan made the conveyance, in order to settle the

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Cary.

the estate in her family, is a sufficient consideration. 5. *Bac. abr.* 366. *cites* *Ld. Bac. Read. on Stat. of uses* 310; and the defendant might aver and prove the consideration. *Randolph vs Epper\** in this court. But the connection, between husband and wife, or wife and husband, is a sufficient consideration to raise a use and support a conveyance; and as it appears, in the deed, that that connection subsisted between the donors in the present case; and that the husband, instead of a chance to be tenant by the curtesy, which is an estate liable to impeachment of waste, was to have an estate for life certain, without any impeachment of waste, there was clearly a sufficient consideration to sustain the deed. Because "a man may covenant to stand seized to the use of A. his wife, and the consideration, that she is his wife will raise a good estate to her; for this is a good consideration in law." 5. *Bac. abr.* 366. 367. 7. *Co.* 40. *Beadles case.* *Owen.* 855. *Plow.* 368. And as the reason is the same the converse of the proposition must be equally true. Therefore the deed in the present case operating as a covenant to stand seized to the use of the husband, that consideration was sufficient to raise an estate in him. Because the estate, which he was to take, under the deed was more beneficial than that, which he would have been entitled to without. It is not necessary to consider the conveyance as at common law; because most clearly, as there were sufficient considerations, it operated as a covenant to stand seized to uses. For the object plainly was that the land should pass one way or another; and therefore it may be good either way, without adhering to any particular kind of way, or any particular mode or form of conveyance. 2. *Wils.* 75. Which case is an express answer to the argument that it could not be considered as a statutory conveyance, because the parties intended a conveyance at common law.

The

\* Ante 125.

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vs  
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The deed was sufficient to enable Mrs. Jordan to convey a fee simple to her appointee. For the trustee was to convey in any manner she might think proper, and it was clearly the general intent to enable her to dispose of the absolute property. Besides the deed amounted to a consent, on the part of the husband, that the wife might make a will, and the verdict finds that she devised it in fee,

The relinquishment was well taken. Because the commissioners are stated to have been Justices of the peace; and although the verdict finds that the commission issued *blank*, it does not state, that it was returned *blank*. But the practice is to issue them blank, and the Justices who take the relinquishment fill them up: Which for aught that appears to the contrary might have been the case here. Besides, unless the contrary be expressly found, it is too much to say, that after the commission has been received and recorded by the court, that it shall be supposed to have been properly executed. The deed expressly states that Mrs. Jordan was an inhabitant of Buckingham; and therefore the verdict does in effect find, that the commission went to the proper county. So that that objection is obviated by the express finding in the verdict; if indeed it be necessary that the Feme should be an inhabitant of the county into which the commission goes; which may perhaps admit of some doubt, as the words in the act are, where the wife resides; which expression may be satisfied by a temporary residence.

RANDOLPH in reply. It was a rule, at that time, that an heir at law should not be disinherited by implication, unless absolutely necessary; and therefore the court will require the observance of the general forms prescribed by the law. Here there was neither money or blood; and without one there was no consideration to raise an use. Mrs. Jordan does not appear to have had her own blood in view; because the deed purports to give her

her an unlimited power of appointing; so that she might have given it to a stranger if she thought proper; and in fact she did so; for the limitation, to the defendant, was a limitation to a stranger, as there was no blood between him and herself. Mrs. Jordan could not convey a fee under the first deed; which only gives a power to convey a life estate; for there are no words of perpetuity; and if the will is relied on, it ought to have been found. The blank commission was void; as the statute expressly requires, that it should be issued to Justices of the peace.

*Cur. adv. vult.*

LYONS Judge. Delivered the resolution of the court; that there was no error in the judgment of the District Court; and that it was to be affirmed.

Judgment Affirmed.

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J A M E S

*against*

M'C U B B I N,

JAMES brought trespass in the County Court against M'Cubbin, and declared, that the defendant on the 11th of March 1790 swore in as sheriff of Hampshire county being first legally appointed. That afterwards, to wit on the 13th of November 1790, the defendant appointed Jonathan Purcell of the said county one of his deputies. That the said Purcell on the 13th of November took the oath of office as deputy sheriff for the defendants, who thereby became liable for his conduct as deputy sheriff. That the said Purcell afterwards on the 1st of January 1792, in order to injure the plaintiff, at the county aforesaid, summoned

If the sheriff's deputy drive or cause to be driven one man's property on the lands of another in order that he may levy a distress warrant on it which he accordingly does an action will lie against the sheriff for it.



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vs  
M'Cubbin.

dry horses, the property of the plaintiff of 50 pounds, drove or procured them to be driven up on the land of James Mercer, where Samuel Bonnifield then lived as tenant, in order that he the said Jonathan might levy a *distress warrant* upon the said property as deputy sheriff, which he did, and afterwards, to wit, on the day and year last mentioned sold the said horses, the property of the plaintiff of the value aforesaid, to the plaintiffs damage £ 100.

The defendant plead *not guilty*; and issue. Verdict for £ 30, and the Court gave judgment accordingly. The plaintiff then released 10s of the damages; and thereupon, the defendant filed a plea in arrest of judgment, which assigned the following reasons. 1. Because the defendant was not sued as late high sheriff. 2. Because the defendant is not legally liable as sheriff for the conduct of Purcell. The County Court overruled the plea in arrest of judgment, and *confirmed* their first judgment. The defendant offered to appeal to the District Court; but the County Court refused to permit him to do so.

The District Court granted a writ of *superse-deas* to the judgment; and totally reversed it.

Whereupon James appealed to this Court.

**WILLIAMS** for the plaintiff. The first point stated in the petition for the *superse-deas* is very clear against the defendant; and the second is equally so. It is a rule that the sheriff shall answer *civilly* for all the acts of his deputy. 6. *Com. Dig.* 416. 2. *Term. Rep.* 156. In this case, the deputy acted as deputy, when he drove the property on the land, in order to make distress; for it was like, taking one mans goods, under an execution against another. 3. *Wils.* 309. 317. *Dougl.* 40. The act of 1748 directs, that the sheriff shall advertize, in order that the owner may claim; but here it was omitted and the deputy sold the property on the same day, on which

which he took it. This was expressly contrary to the act of Assembly; which requires that the property shall be sold in the same manner as if it had been taken under a *fieri facias*.

James  
vs  
M'Cubbin.

*Cur: adv: vult:*

LYONS Judge delivered the resolution of the Court, that the judgment of the District Court should be reversed, and that of the County Court affirmed.

## WALTHALL

against

## JOHNSTON.

JOHNSTON brought detinue for a slave by the name of James against Walthall in the District Court. Plea *non detinet*; and issue. Upon the trial of the cause the defendant filed a bill of exceptions stating, that "It was objected by the attorney for the defendant, that a declaration made by Ellender Willis under whom the defendant claims, after the negro in the writing annexed mentioned, had been sent by her to be sold to the defendant, that nothing was due thereon, should not go to the jury as evidence to prove, that nothing was due under the defeazance thereon indorsed; but the court considered it, as admissible, though not conclusive evidence."

Declarations by the mortgagee, under whom the defendant claims that the mortgage was paid off, are admissible evidence on the part of the plaintiff.

The writing referred to, is in form a bill of sale, from Bough to the said Ellender Willis for the negro James; but there is an indorsement on it signed by the said Ellender Willis, which states, that Bough shall have the negro at any time on or before the 1st of September 1793, by paying

what

Walthall  
vs.  
Johnston.

*what is and shall appear justly due to the said Extender Willis.* This indorsement bears the same date with the bill of sale.

Verdict and judgment for the plaintiff; whereupon Walthall appealed to this court.

RANDOLPH for the appellant. Contended that the witness was interested; and therefore that the judgment of the District Court was erroneous.

*Per: Cur.* There was nothing improper in submitting the evidence to the jury: But it might have been otherwise, if it had been gaming, usury or any other thing of that nature, which was to have been proved.

Judgment Affirmed.

M A Y O

against

C L A R K.

If the District Court refuse to grant a *superfedeas* to a judgment of the County Court, and enter the refusal on record this court will not grant a *mandamus*, but will award a *superfedeas* to the order of the District Court.

MAYO had petitioned the District Court of Richmond for a writ of *superfedeas* to an order of Powhatan County Court for altering a road; which the District Court refused; and entered their refusal on record.

RANDOLPH, moved a few days ago for a rule upon the Judges of the District Court to shew cause why a writ of *mandamus* should not issue to compel them to grant the writ of *superfedeas*? And to day

LYONS Judge, informed him, that the court was of opinion that a *mandamus* was not a proper remedy. That they did not pretend to prescribe what mode he should pursue; because it was sufficient

ient for them to say that his present application  
was improper.

Mayo  
vs.  
Clark.

Whereupon, Randolph moved for, and obtained  
writ of *supersedeas*.

## SKIPWITH

against

MORTON and Company.

**M**ORTON and company brought an action  
of debt against Skipwith in the District  
Court, upon a bill of exchange, for £ 100 sterling  
dated June 15th 1775. The defendant plead  
*payment*, and the plaintiff took issue. On the next  
day on the motion of the defendant, he was allow-  
ed by the court to withdraw the plea of *payment*;  
and thereupon he filed the following plea, "James  
Morton & Co. for the benefit of Alexander Boyd  
plaintiff against Sir Peyton Skipwith defendant.  
And the said Skipwith comes and defends the force  
and injury when &c. and saith that the plaintiffs  
ought not to have or maintain their said action  
against him because he saith that he hath paid to  
the plaintiffs the debt in the declaration mention-  
ed and this he is ready to verify. And the said  
Skipwith for farther plea saith according to the act  
of Assembly in that case made and provided, saith  
that the plaintiffs ought not to have or maintain  
their said action against him, because he saith that  
in the year of our Lord 177 a certain medium  
or kind of money called paper money was made,  
issued and established by act of General Assembly  
passed and enacted in the said year 177 which  
said paper money was by the said act of Assembly

declared

ment will be rendered for the plaintiff.

If to a suit up-  
on a bill of  
exchange dat-  
ed in 1775,  
the defendant  
pleads that he  
tendered the  
interest in pa-  
per money with-  
out confessing  
the action as  
to the princi-  
pal or saying  
any thing in  
bar of it, the  
plea is bad.

The defen-  
dant may give  
such tender in  
evidence to ex-  
tinguish the  
interest on the  
plea of pay-  
ment.

But if he  
withdraws the  
plea of pay-  
ment he relin-  
quishes the  
evidence.

And there-  
fore if there be  
a demurrer to  
the plea of ten-  
der final judg-

Skipwith  
vs  
Morton & co.

declared to be a lawful tender in discharge of all debts contracted or due before that time. And that the said tender if refused should operate as an extinguishment of interest. And the said Skipwith in fact saith that on the sixth day of May in the year 1778, the said Skipwith did in pursuance of the said law tender and offer to pay to the plaintiffs the full amount of the debt, in the said declaration mentioned, together with interest after the rate of ten per centum per annum from the date of the bill of exchange mentioned in the declaration, and also the full charges of protest of the said bill in bills of the said medium or currency called paper money which was by law established as aforesaid. And the defendant farther avers that the said plaintiffs on the day and year aforesaid did refuse to receive or accept the said paper money in discharge of the said debt, interest and charges as aforesaid. Whereby by force of the said act of Assembly all right in the said plaintiffs to recover of the said Skipwith any interest on the debt in the declaration mentioned from the day of the said tender is forfeited: All which the said Skipwith is ready to verify, and therefore he prays judgment if the plaintiffs ought to have or maintain their said action thereof against him." The cause was thereupon sent back to the rules for an issue to be made up therein.

And at the rules the plaintiffs, as to the first plea of the said Skipwith in manner and form by him pleaded, replied that the said Skipwith had not paid the debt in the declaration mentioned; and as to the second plea, they demurred; and for causes stated, 1st. That the said second plea does not sufficiently set forth the act of General Assembly in the said plea mentioned, the time of making, nor the purport thereof. 2d. That the said second plea does not sufficiently set forth in what bills or species of paper medium the tender or offer of payment was made. 3d. That the said second plea does not shew that the defendant has always been ready, since the cause of action accrued

Skipwith

vs

Morton &amp; co.



crued or ever since the time of making the pretended tender aforesaid, to pay, the debt and interest accruing before the time of making the tender and the charges of protest in the declaration mentioned, to the plaintiffs. 4th. That the said second plea does not aver and shew that the said defendant still is ready to pay to the plaintiffs the debt, interest and charges so by him pretended to have been tendered and offered. 5th. That the said defendant in his said second plea does not make a profert *in curia* of the said debt, interest and charges that is over. 6th. That the said second plea is contradictory, that it states the act of Assembly aforesaid to extinguish interest from the time of making the tender, and also states that the plaintiffs right to recover interest, from the said defendant from the time of the pretended tender, is forfeited, yet begins by averring, that the plaintiffs ought not to maintain their action, and concludes by praying, whether the plaintiffs ought to have or maintain their action &c. 7th, and lastly. That the said second plea of the defendant is uncertain and wants form.

The record then proceeds thus, " And at another day to wit, at a Court held for the District aforesaid the 29th, day of April 1796 came the parties by their attornies and the plaintiffs demurrer to the defendants plea of tender was argued and it was considered by the Court that the plea and matters therein contained were not sufficient in law to bar the plaintiffs action and it was farther considered by the Court that the cause be continued till the next Court for the trial of the issue on the plea of payment."

" And at another day to wit at a Court held for the District aforesaid September 29, 1796 came the parties aforesaid by their attornies aforesaid and the attorney for the defendant relinquished the former plea of the said defendant. Therefore it is considered by the Court that the plaintiffs should recover against the said defendant three

" hundred

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"hundred and two pounds sixteen shillings sterling  
"being the principal interest and charges of pr  
"test of the bill of exchange in the declarati  
"mentioned together with interest thereon to l  
"computed after the rate of five per centum p  
"annum from this day to the time of payment a  
"their costs by them about their suit in this b  
"half expended and the defendant in mercy &  
"But the said sterling money may be discharge  
"by twenty eight per cent difference of ex  
"change."

To this judgment Skipwith obtained an order from a judge of this court for a writ of *supersedeas*. The petition stated, that Moreton & co. instituted an action of debt against the petitioner for £100 sterling on a protested bill of exchange; that to this action the petitioner filed a plea of a tender of paper money; to which plea a demurrer having been filed, the said plea was overruled; that the petitioner is advised, that, let the reasons assigned in the said plea, be even valid, (which he in no manner admits) they are founded upon the principle of a tender at common law: Whereas the petitioner is advised, that under an act of the October session, 1787, when paper money was about to expire, he was at liberty to offer in evidence any circumstances for the purpose of rendering judgment more equitable in cases where the no payment was owing, as in this case, to the creditor; that this overruling of the said plea did in fact preclude the petitioner from offering the evidence.

RANDOLPH for the plaintiff in the *supersedeas*. Although the plea would be bad, upon mere common law principles, it is nevertheless sufficient under the acts of Assembly, passed in the years 1777 and 1781. For by the first, it is expressly declared that a tender and refusal shall operate as an extinguishment of interest; and by the latter the Court in such case are to adjust the claim according to the principles of equity. The defendant

therefore

therefore ought to have had an opportunity of proving the tender, and extinguishment of the interest; which he was prevented from doing, by the courts overruling the plea,

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**CALL contra.** The plea unquestionably was not sustainable upon any principle of common law, *Downman vs Downman's executors*. 1. Wash. 26. which case expressly overrules the plea; and it is therefore properly abandoned as a common law plea by the opposite counsel.

Neither can it be supported upon the acts of Assembly. Because it is not an answer to the whole demand; since it merely offers a bar to the interest subsequent to the tender, and neither says or claims any thing, in bar of the principal debt and interest, prior to the tender. For the rules, laid down in *Downman vs Downman's exrs.* not having been pursued, the tender itself was no bar to the debt, and interest prior to the time of making the tender. So that the plea is plainly a partial answer only to the demand, and therefore cannot be supported. For if a declaration demand £100 and the plea is that the defendant has paid £50, without saying any thing as to the residue it is clearly bad. So if in trespass for damage done in two closes, the defendant justifies the trespass in one, without saying any thing as to the other, the plea is insufficient. The principles of these cases are all fully weighed and considered by the Court in the case of *Baird vs Mattox*; \* in which it was determined, that if the defendant be sued both as *heir* and *devisee*, and pleads *nothing by descent*, without saying any thing as to the *devise*, that the plea is bad. Which case comes up to the present in all its parts; and proves beyond all contradiction, that the plea in this case was properly overruled.

The

\* 1. Call's rep. 257.



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The defendant, therefore, if he only meant to insist on an extinguishment of the interest from the date of the tender, ought to have pleaded in the manner in which offsets are frequently pleaded in England; that is to say, he should in his plea have acknowledged the plaintiffs right of action for the principal debt and interest to the day of the tender; and then gone on and stated the tender and consequent extinguishment of the future interest, under the act of Assembly: Which would have been an answer to the whole declaration, but having omitted to do so, his plea was ill; and therefore rightly overruled by the Court below.

But if the defendant was entitled to any deduction, under the acts of Assembly he ought either to have given the circumstances in evidence, under the plea of payment (which he might do according to the decision of this Court in *M'Call vs Turner; \**) or else he should have offered them to the Court, after the verdict was rendered. Having, however, declined all these modes, the fair presumption is, that he had no circumstances to offer, or tender to prove. But, if he had, he, as every other defendant, was bound to shew his circumstances, or plead his tender, according to the forms and manner prescribed by the law. Instead of this however he afterwards withdrew his plea of payment, and gave judgment for the amount of the plaintiffs demand; thereby plainly shewing, that he had no circumstances to offer, or tender to prove; at the same time, that he shut the door against all exceptions to the proceedings; because the confession of judgment was equal to a release of errors, under the act of Jeoffails.

RAYMOND in reply. If the defendant had plead generally to the whole demand, his defence would have been untrue; and therefore the doctrine, contended for, goes to prove, that it is necessary for the defendant to plead an untruth, in order to avail himself of what is true. Although the

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\* 1. Call's Reports p. 132.

the defendant might have given the tender in evidence, under the plea of payment, that did not preclude him from a right to plead it specially, if he chose to do so. No common law rules of pleading apply to the case of paper money; which stands upon its own bottom; and all the decisions of the courts proceed on that idea. The withdrawing of the plea of payment did not alter the merits of the case, under the other plea; which admitted the residue of the demand, by omitting to answer it.

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*CALL contra.* The last position does not satisfy the objection to the plea, on account of its offering only a partial answer, to the demand set forth in the declaration; because it makes the issue immaterial, and produces the necessity of a repleader; as happened in the case of *Baird vs Mattox*.

*Cur. adv. vult.*

**LYONS Judge.** Delivered the resolution of the court, that the plea was clearly bad, in point of form; and therefore was very properly overruled by the District Court. That the defendant might have given the tender in evidence, under the plea of payment in order to have extinguished the interest, subsequent to the tender; but having omitted to do so, and having withdrawn his plea of payment, he had relinquished the evidence, and could not now be received to make an objection upon the ground of a right which he had voluntarily waived.

**ROANE Judge.** The last clause in the act of 1781, appears applicable only to debts contracted during the existence of paper money; and not to such as this which existed long before.

Judgment Affirmed.

DUNLÖP

## DUNLOP

against

## THE COMMONWEALTH.

*Query* Whether an inquisition finding an escheat for want of heirs, should not say in express words that the deceased died without heirs?

An *amicus curia* cannot move to quash an inquisition of escheat unless he either has an interest himself or represents somebody who has.

An *amicus curia* cannot appeal.

**T**HIS was an inquisition of escheat, for the want of heirs, dated 26th July 1796. It finds that Thomas Jackson was in his life-time seized of the premises, and that he died in 17 without will, "Or in any otherwise disposing of the said land, and that no person hath ever since claimed the said land either as a lineal or collateral heir to the said Thomas Jackson deceased."

In April 1798 Dunlop as *amicus curia* moved the District Court to quash the inquisition which they refused. *The court not having jurisdiction thereof.* Whereupon he filed a bill of exceptions which stated the inquisition, and motion to quash it; because the clerk of the court had issued no certificate to the escheator respecting the said inquest; but that the motion was opposed, 1. Because the inquisition had been duly returned into the clerks office and had remained there ever since, without any person having traversed it, or put in or shewn any *monstrans de droit*, or petition of right within six months next after the time of finding the said inquest. 2. Because the court had no jurisdiction of the cause, unless brought before them by a traverse of office, *monstrans de droit*, or petition of right. And that the court being divided, the motion was overruled.

Dunlop appealed from the judgment of the District Court to this Court.

**RANDOLPH** for the appellant. The inquisition, having omitted to state that the decedent died without heirs, is clearly bad; and an *amicus curia* might suggest it to the court, in order that it might be quashed and a new one taken, so as to prevent its

is being set aside at a future day, and purchasers, under the commonwealth, from being injured. The lapse of time made no difference; as no certificate had been granted by the clerk, and therefore it was in the nature of a matter still depending before the court, who had a right to controul the granting of the certificate prior to its emanation. Besides it never could have been the intention of the legislature to bar the claim of men who were not informed of their rights. Else a man, who happened to be out of the state on the day of taking the inquisition and who did not return until a few days after six months, would be precluded from asserting his claim, although he had no opportunity of being informed of it.

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NICHOLAS *Attorney General contra.* The inquisition finds facts tantamount to dying without heirs; for it states that the lands escheated and no set form of words is necessary. But the six months having elapsed is decisive; for the act expressly precludes all objections afterwards. Nor is it material that no certificate had issued; because that was the omission of the clerk, which ought not to prejudice the commonwealth. However, at any rate, an *amicus curiæ* could not move the exception, as he had no interest in the question himself, nor made a suggestion on behalf of any person who was before the Court and concerned in interest. Much less could he appeal; because he sustained no injury, and therefore could not be aggrieved by the Courts not hearkening to his advice, or deciding against his opinion.

RANDOLPH in reply. There is nothing tantamount to dying without heirs found (even if that were sufficient, which it is not;) for the inference drawn by the jury was not warranted by the facts which they had previously stated. Any person may give an appeal bond; and the court will presume that the *amicus curiæ* either had an interest himself or represented somebody who had.

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LYONS Judge. Delivered the resolution of the Court, that, the appeal should be dismissed, because it had been improperly granted; and that the *amicus curiæ* could not move to quash an inquiry, when it did not appear that he had any interest himself, or represented any person who had.

Appeal Dismissed.

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N E L S O N

*against*

A N D E R S O N .

M. appeals from a judgment obtained against him by A. in the county court; N. joins M. in the appeal bond: Then M. dies and the appeal abates, without being revived. N. is exonerated.

A N D E R S O N brought actions of debt in the District Court against Nelson as security to Maury upon two appeal bonds dated December 1st 1786. The conditions of which, after reciting the judgments appealed from, proceeded thus, "Now if the said Walker Maury shall effectually prosecute the said appeal, perform the judgment of the General Court, and pay all costs and damages which shall be awarded by the said General Court, in case the judgment aforesaid shall be affirmed, then the above obligation to be void otherwise to remain in full force and virtue." The plaintiff assigned for breaches of the conditions, "That Walker Maury named in the said condition did not effectually prosecute the appeal mentioned in the said condition according to the form and effect thereof."

The defendant took oyer of the bond and condition; and plead, "That the said Walker Maury departed this life before the trial of the appeal, for the effectual prosecution of which, this defendant is charged by the plaintiffs declaration to have bound himself, and the failure in the same,

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same, on the part of the said Walker Maury is assigned as the breach of the condition of the writing obligatory in the plaintiffs declaration mentioned, whereby an abatement of the said appeal was adjudged by the court, before whom the said appeal was depending on the fifth day of May 1790, at which time and at all times since, no revival of the said appeal has been adjudged or effected. Wherefore he says, that he ought not to be charged &c. All which he is ready to verify; wherefore he prays judgment &c." General demurrer thereto by the plaintiff; and joinder.

The second bond, the pleadings, demurrer and joinder are in all respects the same as the first, except that in the plea the words "and the failure in the same, on the part of the said Walker Maury is assigned as the breach of the condition of the writing obligatory in the plaintiffs declaration mentioned," are omitted.

The District Court gave judgment for the plaintiff; and Nelson appealed to this court.

CALL for the appellant. It is generally true that the act of God excuses the performance of a condition; and there is the same reason for it in this as in other cases; because it was no more practicable for the obligor to have done the act in this than in any other case. If a bond be given to appear and defend a suit, and the defendant dies before the appearance day the securities are discharged; and the reason is the same here, for the undertaking is personal, that he will prosecute the appeal, and not suffer a voluntary nonsuit. The appellees should have sued a *scire facias*, to revive the appeal, and, not having done so, they waived the benefit of the security. For in principle it stands upon the same ground, as an appeal not brought up in two terms; in which case the appellee, who might have brought it up and had damages, cannot afterwards pray them; because and the court he has his advantages in not doing so,

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so, as the delay has prevented a *supersedeas* or writ of error; and similar motives might have actuated the appellee in this case. If the appellee meant to insist on his security, it was his duty to have sued out a *scire facias*; because the executor might not have known of the judgment. The case resembles that of bail in error, who are not liable if the principal dies before the decision in the court of error. 5. *Vin. ab.* 528. *Roll. rep.* 329. The like principle was asserted in this court in *Keel vs Herberts ex'rs.* 1. *Wash.* 138. Which expressly decides, that the non continuance of the suit after the death of one of the parties does not forfeit the bond. For if so, the executors might have brought suit upon the bond in that case. The same idea is pursued by the court in 12. *Mad.* 380; where it is said, that nothing but an actual determination of the cause by the voluntary act of the party, or the judgment of the court will render the securities liable.

**WICKHAM contra.** The rule that the act of God shall excuse the performance of the condition, only applies in those cases, where the executors cannot do the act which is stipulated for, as in the case of the bond for appearance; but wherever the act may be performed by the executor, it is necessary that he do it, or the bond is forfeited. Now here the executor might have prosecuted the appeal; and having failed to do so, the condition of the bond is broken. The case of the appeal, which has not been brought up within two terms, does not apply; because the appellee could have no such advantages here as in that case, inasmuch as the executors, if there was any error, might, notwithstanding the abatement, have obtained a *supersedeas* or writ of error. Nor was it necessary for the appellee to have sued a *scire facias* in order to have apprized them of the appeal, for the law does not admit them to have been ignorant of it. And if the debtor had died insolvent so that no body would administer on his estate, then the appeal could not have been renewed.

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ed. The case of *Keel vs Herberts ex'rs.* was decided without argument; but, in addition to that, the first *supersedeas* was not served, and so no hindrance to the execution. Two objections appear to have been taken in the case in *Roll*, one was decided against the security; and the other merely given up by the court. The case in 12. *Mod.* does not apply; because, there, the suit died with the party, and could not be revived, in the name of the executors.

**CALL** in reply. It was expressly decided in the case in *Roll*, that the death of the principal was a discharge of the security; but the cause went off, upon the point of prior delay, which was disclosed by the plea.

*Cur: adv: vult.*

**LYONS** Judge. Delivered the resolution of the Court, That conditions of this kind, where the act was to be performed personally by one of the parties, were for the benefit of the obligors; who stood excused, when the act of God or of the law prevented the performance. *Laughters case* 5. *Co.* That it rested on the same footing as costs; which are not recoverable, where the party dies and the suit abates, unless it be revived. That the party here, who was to perform, being dead, it was impossible, that the stipulated act could be done by him, which therefore excused the security. But as the condition of the bond, also, was, that he should pay the debt, in case the judgment should be affirmed, if an affirmance had taken place after the death of the principal, the securities would have been liable; and it was in the power of the appellee to have sued a *scire facias* and obtained a judgment of affirmance, if there was no error: whereas, it was not in the power of the security to have done this; neither could he have compelled the executor to have sued a *scire facias* and revived the appeal. That consequently, as the



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the appellee might have done it, and the security could not, it was more reasonable, that the appellee should suffer for the neglect, than that the security should: Especially when it was considered, that if he had actually sued a *scire facias*, the judgment might, perhaps, have been reversed. So that although the security was not in danger, if the cause had been brought to a hearing in the Appellate Court, he might be rendered liable in consequence of the neglect to obtain the *scire facias*. Which never could be right. That the Court was therefore of opinion, that the judgment should be reversed, and judgment entered for the appellant upon the demurrer.

Judgment Reversed.

## WINSTON

against

## THE COMMONWEALTH.

One forth coming bond takes on several executions.

Two separate bonds may be included in one instrument.

**W**ILLIAM OVERTON WINSTON late Sheriff of the county of Hanover, John Winston, Bickerton Winston and James Overton securities for the said William O. Winston; and Cecilia Anderson administratrix of William Anderson deceased, who was likewise late sheriff of the county aforesaid, and Robert Page and Mathew Anderson, securities for the said Cecilia Anderson, gave a bond dated the 26th day of October 1792 to Parke Goodall then present sheriff of the said county in the penalty of £ 15,896: 5: 10; " That " is to say, the said William Overton Winston " and his securities aforesaid in the sum of ten " thousand one hundred and fifty eight pounds " fifteen shillings and the said Cecilia Anderson " and her securities in the sum of five thousand " seven hundred and thirty seven pounds, ten " shillings

"shillings and ten pence. To the payment where-  
 "of well and truly according to our obligation  
 "aforesaid, for the use of the Commonwealth of  
 "Virginia, We bind ourselves our heirs execu-  
 "tors and administrators jointly and severally firm-  
 "ly by these presents."

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The condition was, "That whereas the said  
 "Parke Goodall as present sheriff of the county  
 "aforesaid by virtue of two writs of *fieri facias*  
 "sued out from the General Court of this state,  
 "on the 19th day of June 1792 on behalf of the  
 "Commonwealth against the estate of the said  
 "William O. Winston, as former sheriff of the  
 "said county of Hanover hath seized and taken  
 "into his hands certain property belonging to the  
 "said William O. Winston to satisfy the com-  
 "monwealth the sum of one thousand three hun-  
 "dred and thirty pounds fourteen shillings and  
 "seven pence halfpenny, for the revenue taxes,  
 "the interest and damages thereon and the costs  
 "due from the said William O. Winston as late  
 "sheriff of the county aforesaid for the year 1787.  
 "And also the sum of three thousand six hundred  
 "and forty three pounds three shillings and three  
 "pence for the revenue taxes, the interest and  
 "damages thereon, and the costs due from the said  
 "William O. Winston, as late sheriff of the coun-  
 "ty aforesaid for the year 1788, which property  
 "consists, (setting it forth,) and whereas the said  
 "Parke Goodall as present sheriff as aforesaid, by  
 "virtue of two other writs of *fieri facias* sued out  
 "from the court aforesaid, on the 9th day of July  
 "1792, on behalf of the commonwealth aforesaid  
 "against the estate of the said William Anderson  
 "as former sheriff of the said county, hath seized  
 "and taken into his hands certain property of the  
 "estate of the said William Anderson, to satisfy  
 "the commonwealth, the sum of two thousand  
 "three hundred and sixty three pounds, thirteen  
 "shillings and ninepence, for the Revenue Taxes  
 "the interest and damages thereon, and the costs  
 "due from the said William Anderson as late the-  
 "riff

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“riff of the county aforesaid for the year 1789.  
 “And also the sum of four hundred and forty four  
 “pounds nineteen shillings and ten pence for the  
 “revenue taxes, the interest and damages thereon  
 “and the costs due from the said William Anderson  
 “as late sheriff of the county aforesaid for the year  
 “1790, which property consists (setting it forth) and  
 “whereas by an act of the commonwealth aforesaid  
 “passed on the       day of this present month  
 “October, the said executions are suspended until  
 “the first day of December, which shall be in the  
 “year 1793, provided the aforesaid William O.  
 “Winston and Cecilia Anderson, administratrix as  
 “aforesaid, shall give bond with approved security  
 “to the sheriff of the county aforesaid, for the  
 “forthcoming of their property (by him taken in  
 “execution) on the said first day of December,  
 “1793. Now if the said William O. Winston shall  
 “on the said first day of December 1793, deliver  
 “at Hanover courthouse unto the said Parke Good-  
 “all, as sheriff as aforesaid, the property taken of  
 “him as aforesaid, then the above obligation (so  
 “far as relates to him) the said William O. Win-  
 “ton and his securities shall be void, otherwise to  
 “remain in full force and virtue. And also if the  
 “said Cecilia Anderson &c.” in the same manner  
 as in the case of Winston.

Upon this bond the Auditor gave William O. Winston notice that he should move for judgment against him, John Winston, Joseph Winston, Bickerton Winston, and James Overton “on a  
 “bond dated the twenty sixth of October 1792,  
 “conditioned for the forthcoming of certain prop-  
 “erty therein mentioned seized and taken by  
 “Parke Goodall sheriff of Hanover, by virtue of  
 “two *feri facias*’s issued from the General Court  
 “clerk’s office against your estate.”

Similar notices were given to Joseph Winston, Bickerton Winston, James Overton and John Winston.

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The General Court gave judgment, upon the bond and notices aforesaid, against the defendants, who obtained a writ of *superfedeas* thereto from this Court.

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WARDEN and RANDOLPH for the plaintiffs in the *superfedeas*. The notice is insufficient, as it does not state that the executions issued at the suit of the commonwealth, or at whose instance the motion was to be made. Neither does it mention the penalty or the sum in the condition, nor the names of all the obligors, or to whom the bond was payable. One forthcoming bond cannot be taken on two or more executions; and therefore a summary judgment could not regularly be entered on it. The penalty of the bond involves uncertainty, for first the whole £ 15,896: 5 10 is stated, and then the obligors are bound in separate parcels, and lastly the aggregate sum is taken again. The act of Assembly concerning forthcoming bonds says they shall be payable to the creditor. But here the commonwealth was creditor, and yet the bond is payable to Goodall; and although it is afterwards said *to the use of the commonwealth* that will not satisfy the law. The day appointed in the condition of the bond for the sale of the property was *Sunday*; which is not a juridical day; and a performance of the condition would have been illegal.

NICHOLAS Attorney General *contra*. The notice is good, for all that is required is, that the defendants should know on what bond the motion will be made, and any description answering that end is enough. Here the defendants were sufficiently apprized of the bond on which the Auditor intended to move; for, from the various particulars mentioned, it was impossible for them to mistake. As to the objection that one bond was taken on two executions it has no weight in the present case; because the act of Assembly, passed for that purpose only, expressly makes use of the word *bond* and not *bonds*; which seems necessarily

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necessarily to require that one bond only should be taken. The Auditor, as taking care of this department of the public affairs, was the proper person to give the notice, and not the sheriff. That the property was to be delivered on a Sunday makes no difference; because that was formerly a legal day, and it is held, in 3. Burr. 1601, that a ministerial act may still be done on that day. But what is decisive is, that the act of Assembly declares it may be done upon that day.

*Cur: adv: vult.*

ROANE Judge. The bond, on which the motion is founded, is to be considered as one of two several obligations entered into on the part of the two several sheriffs and their respective securities, although consolidated in the same instrument. This construction arises not only from its being stated in the obligation that Winston and his securities are bound in the sum of £ 10,158: 15, and Cecilia Anderson and her securities in the sum of £ 5,737: 10: 10, but also from the terms therein used, that the obligors are bound for the payment "According to our obligation aforesaid." What is mentioned of the amount of the aggregate sum does not vary the construction, and is only as a memorandum of the amount of both bonds taken together.

Considering this instrument however as containing either one bond, or two several bonds, a question arises, whether as it is subscribed by all the obligors they are not all liable for the whole amount? And that they are so liable derives some colour from its being stated in the obligation that the obligors are bound jointly and severally; but this construction is done away by that part of the condition which states that on a delivery by each sett of obligors, the bond is void as to them, which would not be the case if each set of obligors were bound for the other.

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The words jointly and severally therefore in the obligation are to be taken *reddenda singula singulis*, to extend to each set of obligors and to each several obligation, and not to all the obligors with reference to both obligations.

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If this be a separate bond, though contained in the same instrument, with another bond, most of the objections to the bond and to the notice will fall to the ground.

Indeed the bond seems taken agreeably to the act of Assembly which has been cited relating hereto, and the notice is sufficiently particular and descriptive to warn the defendant of what he is to answer. The Auditor having signed the notice, its being dated at the Auditor's office, and stating that instructions will be given the Attorney General, are circumstances clearly indicative of its being a *public bond* which was to be moved upon: And when in addition to this, it is recollected that the notice further states, all the obligors except a deceased one; as well as, the date of the bond; its being a bond for the forthcoming of property; the particular sheriff by whom taken; and that the property therein mentioned, was taken in execution by virtue of two writs of *fieri facias* issued from the Clerk's office of the General Court, there is a reasonable degree of certainty, as to the very bond, which was to be moved upon: And I believe that very many judgments have been affirmed in this court, upon notices not more particular. I am therefore for affirming the judgment,

CARRINGTON Judge. As the counsel for the plaintiffs in the supersedeas have insisted on their exceptions with great earnestness, I shall consider them in the order in which they were made, and give an answer to each of them.

The first exception is, that the notice does not state that the motion would be made at the instance of the commonwealth, or designate the parties

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ties to the bond; but merely that, a motion would be made on a bond payable to Parke Goodall.

The date of the bond however is mentioned, and that the condition was for the delivery of property taken by Parke Goodall, Sheriff of Hanover, by virtue of two writs of *fieri facias* issued, from the office of the General Court, against the estate of the defendant Winston; which was sufficiently descriptive of the bond: And if the defendants had given any other bond of the same date, under the like writs, so as to render it uncertain which was meant they might have shewn it. But, as none such is suggested, the fair presumption is, that none such existed.

The next objection is, that neither the penalty or the sum due is mentioned.

The answer to the last objection is an answer to this also.

The third objection is, that all the obligors are not mentioned, *nor the person, to whom the bond is payable, sufficiently described.*

But as the defendants were all obligors and the motion not intended to be made against any other; as too the bond was joint and several; and Parke Goodall the obligee expressly named, there was no occasion to be more particular, as those circumstances gave the defendants full notice of the bond on which the motion would be made.

The fourth exception is, that one bond was taken on two executions.

This indeed is not common; but it does not follow from thence that the bond is void. No disadvantage could result to Winston from it, as he was not thereby subjected to more than he owed himself; for care is taken to prevent that. Besides it seems agreeable to the directions of the act of Assembly; which rather points at one bond only.

The

The fifth objection is, that two separate debtors are included in the same bond.

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This is nearly the same idea with that in the last exception; and may receive the same answer. For the condition designates the debt of each; and provides for the discharge of each. So that neither is in danger of sustaining any damage from the other.

The sixth error assigned is, that the bond should have been made payable to the creditor.

But that was not necessary in this case; because the act of Assembly directed that it should be taken to the sheriff for the use of the commonwealth.

The last exception is, that the day on which the property was to be delivered was Sunday.

But this surely could be no objection in this case; because the act of Assembly had expressly directed it; and therefore if it be true that it was contrary to law in common cases, it clearly was not so in this. For the sheriff stood justified by the act.

Upon the whole the exceptions taken by the plaintiffs counsel seem to me untenable: and therefore I am for affirming the judgment.

LYONS Judge. Concurred.

Judgment Affirmed.

WALCOTT



## WALCOTT &amp; al.

against

SWAN &amp; al.

S agrees to locate certain lands for W, B and N, in the county of R, afterwards he agrees to locate the same lands for M; and having received land warrants from M for that purpose, he accordingly locates the lands. After this, B and N abandon their contract to W who renews the contract with S, who thereupon transfers the entries of M from the county of R to the county of L. This shall not disappoint M for the lands in L will be accorded him, on his releasing S from his payments and paying the fees for locating and

**T**HIS was an appeal from a decree of the High Court of Chancery where Swan and M'Rae brought a bill against Walcott, Smyth and Price, the Register of the Land Office, stating, That on the 21st day of July 1795, the plaintiffs entered into a contract, concerning the location of certain lands; That Smyth, stated to the plaintiff M'Rae a particular tract of country, lying in Russel County as answering the description of the lands agreed to be located, by the plaintiff M'Rae for the plaintiff Swan. That after some conversation, on this subject, the plaintiff M'Rae entered into the annexed contract with the said Smyth. That under the said contract, the plaintiff M'Rae delivered to the said Smyth land warrants amounting to 300,000, acres, for which he took his receipt, dated the 14th of September 1795. That these warrants were located by the said Smyth in Russel county, on the very lands the plaintiff M'Rae believes which had been described by him, and which he had stipulated to locate. That after this, the defendant Walcott applied to the said Smyth, and gave him a considerable sum of money; in consideration of which he assigned to the said Walcott the warrants aforesaid, and the entries made for the plaintiffs; and took in exchange a location, which was made for the said Walcott in the county of Lee, on lands not answering, as the plaintiff M'Rae believes the description of his contract, and of value considerably inferior to that, which was actually located, for the plaintiffs under their contract. That these lands have been included, in a large survey of 650,000 acres, made for the said Walcott, and returned to the Register; who, if not prevented,

will

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will issue a patent therefor to the said Walcott. That the said Smyth had no authority to dispose of the plaintiffs locations, after having made them; and that, if he even possessed such power, the motives for his conduct were such as would render the act totally void. The bill therefore prays that the Register may be enjoined, from issuing the said patent to the said Walcott; and be decreed to issue 300,000 acres thereof, to the plaintiff Swan; or that the said Walcott may be decreed to assign, that part of his said survey, which was originally entered on the warrants of the plaintiff Swan, to him the said Swan; and that the plaintiffs may have general relief.

The answer of Walcott states, sometime in or about the month of June 1795, that defendants together with Booth and Nichols all of Connecticut, were in the county of Montgomery in Virginia, where they met with the defendant Smyth. That, after some conversation, respecting the unappropriated lands in Virginia, the said Smyth proposed to locate and survey, for them, a tract of country on the waters of the Big Sandy River, between the eastern and the main branches of the said river (and which the defendant avers to be the land in question) upon certain terms, which were acceded to by them. In consequence of which, articles of agreement were entered into, between the said Smyth; of the one part; and the defendant, the said Booth and Nichols on the other: Whereby, the latter parties stipulated to return to Connecticut, and to procure the money which might be necessary to carry the contract into effect on their part, and to meet the said Smyth in the city of Richmond on the 20th of September following, for the purpose of delivering him land warrants, from half a million to a million and a half of acres, and of paying down such sums as they stipulated to advance, towards completing the business: On the other hand, the said Smyth agreed to locate the said warrants, upon the lands above described, to meet the defendant and his partners

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partners before mentioned, at the city of Richmond, on the said 20th day of September; and in the mean time to enter into no negotiations for locating the said lands, with any other persons. That the said Smyth also agreed to warrant the title of the said land against all prior claims, except such as might be ascertained by the state of Kentucky; it being questioned, whether the said lands, or some part thereof did not lie, within the limits of that state. That in consequence of this contract, the defendant and the said Booth and Nichols returned to Connecticut, and succeeded in raising a sum of money, sufficient to enable them to comply fully with their agreement to the extent of 1,500,000 acres of land. But to do this, so far as concerned the interest of the defendant, he was under the necessity, of entering into contracts with several persons in that state, obliging himself to procure for them upon the contingencies expressed in his agreement with the said Smyth, so much of those lands as amounted to the defendants interest in the said contract. That the defendant together with the said Booth and Nichols, returned to Richmond, by the time appointed, prepared to perform their part of the contract, entered into with Smyth; and were much disappointed, on finding that the said Smyth had left that place a few days prior to the said 20th of September. That in this situation of things, the said Booth and Nichols relinquished to the defendant all their interest in the said contract: which he accepted, and determined to improve. For which purpose, he determined to purchase warrants, to the amount of 500,000 acres (although he came prepared to take up 850,000 acres) intending to procure as many warrants, as would cover the last mentioned quantity, if so much could be found unappropriated. That the defendant went immediately to the house of the said Smyth; who informed him, that, having understood, before he left Richmond that the defendant and his partners had abandoned the intention of meeting

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him at the time appointed, or of proceeding, farther with the contract, he had supposed it unnecessary to continue longer, at that place; and had therefore entered 300,000 acres of the land, mentioned in that contract in the name of the complainant Swan: But he acknowledged the prior obligation, under which he was, to comply with the contract he had made with the defendant; and affirming, that he had entered into no engagements with the complainant Swan, which obliged him to locate, for the said Swan, the land in question, he for these, as well as for other reasons to be mentioned, entered into a new agreement with the defendant to locate and survey, for the defendant 850,000 acres of the land mentioned in the first contract, upon the same conditions, and terms, as were therein mentioned; so far as they respected the warranty of said Smyth, the sums to be paid by the defendants, and the times of payment; That Smyth also stipulated, to withdraw the above entry for 300,000 acres, and to locate and survey the same for the defendant. That the additional reasons, stated by the said Smyth, for withdrawing the said entry and transferring the same to the defendant were such as convinced the defendant that the said Smyth possessed, not only the power, to do so, but that it was also his duty. That he informed the defendant that he was bound to procure for the said Swan, lands of a particular character, and had also agreed to warrant them generally, and without exception. That he knew of a tract of unappropriated land in the county of Lee, which, in his opinion, would better correspond with the description mentioned in his contract; and above all, that this last mentioned tract was not involved in the question, whether the lands on Sandy River are within the territorial limits of Virginia or not? A risk which he had not taken upon himself, in his contract with the defendant and to which he did not wish to subject himself, or the complainant. That the tract of land in Lee coun-

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ty, was more valuable, both as to soil and its vicinity to the settled parts of the state, than that in Russel county. That in consequence of this last contract, entered into with the defendant the said Smyth did, afterwards, transfer to the defendant the entry made for the complainant Swan, and did locate and survey an equal quantity of better land, for the said Swan, or for the complainants, in the county of Lee. That the said Smyth surveyed for the defendant 650,000 acres of land in Russel county, conformably with his contracts, including the above entry of said Swan's; the plat and certificate of which, have been returned to the Registers Office, a sufficient length of time for a grant to issue thereon. That the said Smyth has not located any lands for him, in the county of Lee, or elsewhere; and if he had, the defendant was not bound, by his agreement with the said Smyth, nor could he consistently with his contracts in Connecticut, before spoken of, have consented to take lands in Lee county; although they were more valuable, than those in Russell. For the defendant, having expressly stipulated with those who advanced him money, to procure for them the very lands described in the said Smyth's contract, could not have ventured to exchange them, for others. That Smyth was not induced by any unfair or improper conduct of the defendant or by any pecuniary consideration, other than is beforementioned, to transfer the said entry to the defendant. On the contrary he believes, and did then believe, that the said Smyth had, as the necessary consequence of his contract with the complainant, a perfect power to act as he did; that he meant to act fairly towards all the parties; and that he was influenced by no other motives than a regard to the real interest of the complainant and himself; and a desire to fulfil, with good faith, his contracts with all parties. That to do this, it was necessary to remove the location of the said Swan from lands, which did not, so well answer the description of the contract,

and

and were besides, entangled in a question of much difficulty, as to the title. On the other hand he had identified this very land to the defendant; who, with a knowledge of the claim of Kentucky had, notwithstanding consented to take it up; and to take, upon himself, the risk of this claim. That the defendant is advised, that, if the said Smyth hath violated any engagements which he hath made with the complainants, he is answerable to them; but that all acts performed by him, as their agent, if fair (as in this case they certainly were,) are binding upon the complainants in law and equity. That the defendant had a prior equity to that of the complainants to the land, in question; which was known to their agent Smyth; which he was bound, to protect; and which he could not have defeated, if such had been his wish.

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The answer of Smyth states, that some time in the Summer of 1795, the defendant fell in company with Walcott, Booth and Nichols, at the surveyor's office in Montgomery; who being engaged in acquiring lands, the defendant described to them a tract of country, lying between the branches of Sandy river, respecting which, doubts were entertained, whether it lay in Kentucky or Virginia? And having apprized them of the nature of the question, entered into a contract with them to locate and have surveyed the said lands, as lying in Russell county; they taking the risque of the Kentucky right upon themselves. That by the contract, the defendant was to meet the said Walcott, Booth and Nichols in Richmond, on the 20th September ensuing, to receive land warrants, and so much money, as was necessary to carry the contract into effect; but it was verbally agreed by Nichols and the defendant to meet a week earlier, than the time mentioned in the agreement. That the defendant proceeded to Richmond by the time appointed; but received information, from a person, whom he supposed entitled to his confidence, that the said Walcott and

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and his partners had abandoned the undertaking on their part; and having remained, at Richmond, until the arrival of the stage, by which he expected the said Nichols, and hearing nothing from him, the defendant took, for granted, the information which had been given him, and offered to locate the lands in question for others. That he was introduced to the plaintiff M'Rae, and proposed to contract, to locate, for him, the particular lands in question; but he declined accepting the offer made him; not choosing to contract, unless for lands warranted within the limits of Virginia, and of a particular description. That the defendant had been misled to suppose, and then actually did suppose, the lands in question to approach, nearer to the description required, than any other unappropriated lands he had heard of in Virginia, and therefore took the opinion of counsel relative to the right of Virginia to those lands; which, founded on the information then given, was more favorable than his own. After which he entered into a contract with the plaintiff M'Rae; but did not therein, stipulate to locate the lands in question for Swan. On the contrary, as he stipulated to procure lands *within* the limits of Virginia, and *not* mountainous, to have procured the lands on Sandy, would have been a direct violation of that stipulation. That, having received 300,000 acres of land warrants, from the said M'Rae, and 100 dollars to bear incidental charges, the defendant left Richmond, about the 16th of September, and went to Russell, and made an entry of 300,000 acres of the land in question; but information then received, while on the frontier, materially changed his opinion of those lands, and caused him to repent of his contract, and to despair of fulfilling it, unless by locating those warrants on some other lands. That, on the arrival of the said Walcott, in Wythe, in October following, the defendant, who had become convinced, that surveying the lands on Sandy for Swan, would ruin himself and M'Rae, re-

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gave his agreement to locate and survey the lands for Walcott; who took the risk of the Kentucky right upon himself. And in the contract, then entered into, it was stipulated, that the defendant should locate Walcott's warrants according to the words of a location, made for Swan, *which said Smyth has determined to remove*; it not having been then contemplated, reciprocal, by to transfer entries or warrants of one to another, by way of exchange. That the defendant did not in consideration of a sum of money assign to Walcott the warrants of Swan and the entries made thereon; but the reason for the reciprocal transfers, was, as follows, upon receiving the warrants of Walcott to the amount of 300,000 acres, the defendant sent the whole of them to the office of the surveyor of Russell; where they were lodged; it being meant they should be there fully executed. But only 200,000 acres were entered, adjoining the entry made in Swan's name. The certificate of the surveyor that 300,000 acres thereof were unappropriated, was forwarded to Lee, in order to found an entry, to secure vacant lands, in that county. That, the defendant cannot now ascertain at what time, he determined to adopt the mode of reciprocal transfers of the entries, nor does he suppose it material. That it was an unfortunate plan, as now appears, and by no means necessary to effect the object. That when the defendant sent Walcott's warrants to Lee, had he then ordered Swan's to have been withdrawn, and finished each person's surveys on the warrants issued to him, the present difficulty would have been avoided; and he would have been thus cautious, had he suspected Swan or Lee of base principles, or supposed they would have corrupted such principles to him. That when he went to survey the lands, in December following, he might still have withdrawn the different entries, and removed the warrants of each person to the land intended for him: But to this

plan



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That the following objections occurred; had the entry made in Swan's name in September been withdrawn, that might possibly have let in some younger claim to the same lands, by entry in Kanawa; and, if not, as the lands must have been left uncovered by an entry in Russell, until the defendant could have travelled to Lee, withdrawn the entry there made in Walcott's name, and returned, some other person might have covered the lands, by entry in Russell or Kanawa, within that period. That to prevent these consequences, and save himself a disagreeable ride of near 300 miles, *and with no other motive*, the defendant determined to transfer the entry on Swan's warrants to Walcott on the surveyor's entry book, in exchange for the entry on Walcott's warrants in Lee of like amount; and endorsed a memorandum thereof on all the warrants. After which, those 300,000 acres (the entry of which was thus transferred) and 350,000 acres entered, adjoining in Walcott's own name, were re-entered in his name, by way of amendatory entry and then surveyed. That, had it not been for the confidence the defendant placed in the complainants, a doubt might possibly have suggested itself as to the propriety and validity of the mode of proceeding, adopted by him. But, as a confidence existed, and as it is not an uncommon practice for persons entrusted with warrants, not assigned to them, surveyors, and others to make transfers of entries thereon; and as the defendant was more than a common agent, being a joint proprietor of the lands to be acquired in Swan's name, he had no suspicion, nor does he admit, that he exceeded his powers, particularly as the transaction was not to the detriment, but for the advancement of the complainant's interest, and tended to the fulfillment of both the defendants contracts. That, in order, that the return of Swan's plats should not be delayed, the defendant advanced the surveyor's fees out of his own pocket, without having received them, and being informed, that a dispute

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would arise respecting the lands, he wrote to the complainant M'Rae a letter, in which was the following passage; "Whatever may be your determination or its consequences, it is plain you ought to pay fees on 300,000 acres of land, if you are entitled to so much of the lands surveyed for Mr. Walcott, he is entitled to the lands surveyed for Mr. Swan, and the latter ought to be registered at your expence, as the former was at his. I therefore trust you will pay Mr. Price the Register's fees on 300,000 acres. It may be so done I presume as to have no effect on the question, if you make one; which I hope you will not. I have also a right to the surveyor's fees, which in confidence of being re-imburshed, I have advanced out of my own pocket." That the complainants have withheld the Register's and Surveyor's fees; although they ask, that 300,000 acres of land, surveyed and registered at the charge of Walcott, may be granted to Swan. That, the transfer was not injurious to the complainants, having regard to the intrinsic value of the different tracts of land surveyed; and the defendant believes, that the land, acquired in Lee county, is, to its quantity, among the most valuable acquisitions made in this state; since the first opening of the Land Office: It being chiefly and susceptible of cultivation, left by settlers of little foresight, and who surveyed small dispersed farms. On the contrary, the tract in the fork of Sandy, is, as the defendant is informed, and believes an assemblage of steep hills; among which, and creeks, are some narrow bottoms covered with prior claims. That to satisfy the complainants of the attention of the defendant to their interests, an affidavit, to this effect, of a surveyor, who had surveyed a large quantity of those prior claims, entered in the office of Bourbon in Kentucky by the surveyor of Russell, himself, was submitted by the defendant to Pollard their agent. That, the complainants have been deaf to the information given by the defendant. Al-

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though the lands lie in Kentucky as the defendant is convinced; and he gives his reasons for thinking so. That no part of the defendants conduct towards any of the parties has been unfair, or unjust: That, in making the transfer called in question, he was actuated by no improper motive; and only substituted an easy mode of effecting an object, in itself uncensurable in place of a troublesome mode of effecting the same object. That the object, thus effected, was beneficial to those who complain, if they mean no unfair advantage of any other person; and that therefore and because of the usage in this respect, and of his interest in the thing transferred, the said transfer ought to be held valid and the injunction dissolved. But if the court should be of opinion, to decree the lands to the complainants, the defendant prays, they may be compelled to take them as a complete satisfaction of his contract with them; and that he may be exonerated from any responsibility for the title or description of the lands in question; as they are not the lands he has procured for the complainants.

The deposition of Pollard is as follows,

Sometime in the month of September 1795, Alexander Smyth of Wythe county applied to me and informed me that he knew of a valuable tract of waste and unappropriated land, which he wished to obtain warrants to locate on, but had not the means of procuring them and therefore would gladly interest me in the business, if I would furnish warrants, and proceeded to describe the lands and the part of the country in which they lay, in confidence that I would not discover it to any other person, if I did not become interest myself, on having my assurance that I would not, he informed me that the lands lay within the forks of Sandy river, and were of a superior quality to any that had been taken up for a considerable length of time and were of consequence a great object to any person who had the means of adventuring in  
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business, that the cause of their remaining so long vacant was owing to an opinion being generally had that they were within the state of Kentucky, but that he had been at considerable pains to investigate the various laws which established and described the boundary line between Virginia and Kentucky and was fully satisfied that the lands were within the former State.

It not being convenient for me to engage in the business, and knowing that a large quantity of land warrants had been issued in the name of James Swann which were in the hands of Alexander M'Rae, unlocated, I informed Mr. Smyth that I would mention the subject to a friend of mine who I knew had warrants, and if he discovered an inclination to treat I would then introduce him, which Mr. Smyth consented to. On the subject being mentioned to M'Rae he desired an interview with the other immediately, and after being together some short time, Smyth returned and informed me that M'Rae would not contract with him unless he would give a general warrantee title to the land, and although he was well satisfied in his own mind that the title would be good he had determined to take counsel before he would bind himself to give such a one as was required, he accordingly went off and returned in some time after, informed me that the gentleman or gentlemen with whom he had advised after examining the laws on the subject conceived with him that the lands were clearly within the commonwealth of Virginia, and that he had determined to engage with Mr. M'Rae on the terms he had proposed, the 5th 1797.

Another witness says that Walcott acknowledged that he gave the other defendant Smyth four cents per acre inclusive of land warrants, surveys and registering fees, for all the land in dispute, between the above parties and the rest of the land taken up by the said Walcott in the forks of the Sandy.

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There are amongst the exhibits the agreement between Walcott, Boothe and Nichols; that between M'Rae and Smyth, and that between Walcott and Smyth together with copies of the land warrants indorsements, transfers &c.

The Court of Chancery delivered the following opinion. "That from the agreement of June in the year one thousand seven hundred and ninety five, between the defendant Alexander Walcott David Booth for himself and as attorney for several other people, and Austin Nichols of the one part and Alexander Smyth of the other part, the defendant Alexander Wolcot and his associates derived no right to the land in controversy; because the defendant Alexander Smyth had no such right, but it was in the commonwealth until it should be regularly appropriated. That in the land office treasury warrants which authorized the surveying and laying off land for the plaintiff James Swan; the words "this warrant is executed H. Smyth S. R. C." were a legal entry of the land in controversy, for the benefit of the plaintiff, and gave to him an equitable title against the commonwealth, and every posterior claimant under it, in that identical land; and that the surveyor could not transfer that right, nor could the defendant Alexander Smyth, transfer it except as to his own interest in one sixth part of the said land, without authority from his constituents. The agreement between him and the plaintiff Alexander M'Rae of September in the year one thousand seven hundred and ninety five, did not in any way confer that authority, nor is such authority implied in, nor doth it flow from the nature of the agents office, as the defendant's counsel insisted. And therefore the Court doth adjudge order and decree, that the defendant Alexander Walcott do assign, to the plaintiff James Swan, all that defendants right and title in and to three hundred thousand acres of land, part of the six hundred and fifty thousand acres of land certified to have been surveyed for him, and completed the seventeenth

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Swan

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month day of December one thousand seven hundred and ninety five by the surveyor of Russell county; and that the defendant William Price, or the Register of the Land Office, for the time being, to make out in due form the letters patent of the Commonwealth, to be presented to the Governor or signature, granting, to the plaintiff James Swan, he said three hundred thousand acres of land, to be holden by him for the use of the persons entitled thereto, by the articles of agreement, between the plaintiff Alexander M'Rae of the one part, and the defendant Alexander Smyth of the other part, of the fourteenth day of September in the year one thousand seven hundred and ninety five." That Court therefore appointed commissioners, "for laying off, with any surveyor or surveyors whom the plaintiffs shall think fit to employ, he said three hundred thousand acres of land, in the place in which they ought to have been laid off by virtue of the entry, for the plaintiff James Swan, if the defendant Alexander Smyth had not undertaken to transfer the entry to the other defendant; and in such manner as to exclude, in calculating and casting up the contents of the area of the plat, all prior legal claims." And decreed, that the plaintiff James Swan should within two months from that date, release all his right and title in and to the lands entered for him in the county of Lee by the defendant Smyth." From which decree the defendant Walcott prayed an appeal to this Court.

This court made the following decree. "This day came the parties by their counsel and the court having maturely considered the transcript of the record and the arguments of the counsel, is of opinion, that so much of the decree aforesaid, as directs the appellant to assign to the appellee James Swan all the appellants right and title to the lands in the county of Russell, in the decree mentioned, before the appellees pay to the appellant the money advanced by him for

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“ surveyor’s and register’s fees on [sic] account of the  
 “ said land, is erroneous: *And* that the said de-  
 “ cree is also erroneous, in not directing the ap-  
 “ pellees, on receiving the assignment aforesaid  
 “ to release and discharge Alexander Smyth, in  
 “ the proceedings named, from all covenants and  
 “ agreements on his part, contained in the articles  
 “ entered into by him with the appellee Alexan-  
 “ der M’Rae on the fourteenth of September  
 “ 1795, referred to in the decree, so far as the  
 “ said articles relate to the quantity, title, soil  
 “ or description of the lands covenanted to be lo-  
 “ cated and surveyed for the appellees, by the  
 “ said Alexander Smyth. *But* that there is no er-  
 “ ror in the residue of the said decree. There-  
 “ fore it is decreed and ordered, that so much of  
 “ the said decree as is herein stated to be errone-  
 “ ous, be reversed and annulled. *That* an account  
 “ be taken of the money advanced by the appel-  
 “ lant and Alexander Smyth, or either of them,  
 “ for surveyor’s and register’s fees; and that, on  
 “ payment thereof with interest, the appellant  
 “ assign, to the appellee James Swan, all the appel-  
 “ lant’s right and title in and to the three hundred  
 “ thousand acres of land, part of the six hundred  
 “ and fifty thousand acres of land, certified to  
 “ have been surveyed for him and compleated the  
 “ seventeenth day of December 1795 by the sur-  
 “ veyor of Russell county: *And* that after such  
 “ assignment shall have been duly made, and ap-  
 “ proved by the Court of Chancery, that the ap-  
 “ pellees release to Alexander Smyth all actions  
 “ and suits, and fully discharge him from all his  
 “ covenants contained in the agreement, made be-  
 “ tween him and the appellee Alexander M’Rae  
 “ on the fourteenth of September 1795, before  
 “ mentioned, so far as the articles relate to the  
 “ quantity, title, soil, or description of the lands  
 “ covenanted to be located and surveyed for the  
 “ appellees by the said Alexander Smyth, within  
 “ such time as the Court of Chancery shall di-  
 “ rect: *And* that the same time be allowed the ap-

appellee

paltee, James Swan to release his right and title to the lands in the county of Lee, according to the decree of the said Court of Chancery. That the residue of the said decree be affirmed; and that the appellees pay to the appellant his costs by him expended in the prosecution of his appeal aforesaid here."

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## HIGGENBOTHAM

against

RUCKER.

**H**IGGENBOTHAM brought detinue in the County Court against Rucker for four slaves. Plea non detinet and issue. The jury found the following special verdict, "We of the jury find that in January 1793 the plaintiff was possessed of the slaves in the declaration mentioned, as his own proper slaves. We also find that on the thirtieth day of January 1793 the defendant intermarried with the plaintiffs daughter, after which time the plaintiff gave to his daughter the wife of the defendant the negroes in the declaration mentioned, to her and the heirs of her body, and in case she died without issue, that is children of her body, the said negroes to return to the plaintiff. We also find that in less than twelve months, after the gift and intermarriage, the plaintiffs daughter departed this life without issue. We also find that since the negroes in the declaration mentioned, came into the defendants possession they have increased one in number. We of the jury find for the plaintiff the negroes in the declaration mentioned, in case the law be for the plaintiff, if to be had, if not one hundred and fifty pounds damages; if the law be for the defendant we find

A man makes a gift of slaves to his daughter and the heirs of her body, and in case she died without issue that is children of her body, the said slaves to return to the grantor, this limitation is not too remote, and therefore is good.

If in a declaration for several slaves laying separate values, the jury find a joint value it is error, and as to that a *verdict facias de novo* will be awarded under the act of Assembly in order to ascertain the separate values.

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"for the defendant." The County Court gave judgment in favour of the plaintiff, for the slaves and damages.

The defendant thereupon filed a bill of exceptions stating, "That upon the courts deciding the question of law, the defendant, by his attorney, moved the court to award a *venire facias de novo*, because he saith that the verdict rendered by the jury in this case is so defective that a judgment ought not to be rendered thereupon inasmuch as the jury hath not severed the value of the several negroes in the declaration and verdict mentioned, but was overruled by the court."

The defendant appealed from the judgment of the County Court to the District Court; where the judgment of the County Court was reversed with costs: And from the judgment of reversal Higgenbotham appealed to this court.

RANDOLPH for the appellant. The obvious intention of the donor was to give an estate determinable on the death of his daughter without any issue then alive; which is a reasonable period of time, and therefore the limitation is not too remote. For the jury expressly find that by issue he meant children; which confines and ties up the preceding words, heirs of her body, to the time of her own death. But under another point of view the limitation over is good; for the children were purchasers, and therefore the daughters interest was merely an estate for life, which expired at her death without issue.

The joint assessment of the value of the slaves is not erroneous, *Jenk. Cent.* 112. *Lees cas.* 283 5. *Mod.* 77, or if wrong, yet there being no certainty, whether it applied to the damages for detention or the value, that part of the finding is nugatory; and therefore under the act of Assembly the court may award a writ of enquiry to assess the value.

CALL

**CALL contra.** Submitted the question whether it had not been already settled both in England and this country, that the joint assessment of the value was erroneous,

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And as to the merits, it never has been doubted that such a limitation as this was too remote. All the cases both in England and this country establish it beyond all controversy. *Goodwin vs. Taylor* 2. Wash. 74. Nor has it ever been decided, in any case, that if there be a limitation to one and the heirs or issue of his body, and if he die without issue remainder over, that the remainder is good, unless there be some circumstance or expression to tie it up and abridge the generality of the first words, 2. *Fenbl. Eq.* 327. Neither will little circumstances or slight expressions be sufficient; but they must be such as afford a fair and clear demonstration. 1. *Bro. ex. Cby.* 190. Children is no more than issue, and issue than children. Particularly where no child was born at the time of the gift; and therefore the insertion of that word in the verdict is not material. Besides this was the case of a gift in the life time, and therefore less latitude is to be allowed, than in the case of a will; which being made *in extremis*, the court makes some allowance for the testators situation. Whereas a disposition in the life time of the donor is taken to be made with more caution; because the grantor might have had counsel if he had chosen it.

**RANDOLPH** in reply. I admit the rule as laid down by Mr. Call, that there must be something to confine the limitation to a reasonable period of time; but I contend that this is done in the present instance; for the word *children* does it. Especially as that is a word of purchase and particularly in a deed; so that the difference insisted on is in our favour. The court will the more readily adopt my construction; because the intention of the donor was reasonable. For if his daughter had issue he intended they should have the benefit

of

~~Higgenbotham~~ <sup>vs</sup> **Rucker.** of the estate; but if not, then, instead of its going to strangers, he intended it should return to his own family again. The case of *Dunn vs Bray* (1. *Call's rep.* 338.) in this court contains reasoning expressly apposite to what I contend for.

**CALL.** That case was determined on the authority of *Pinbury vs Elkin* and other cases in *P. Wms.* But not one of those cases resembles the present.

*Curr. adv. vult.*

**ROANE Judge.** The first question I shall consider in this cause is upon the title to the slaves mentioned in the declaration.

This question depends upon the limitation over to Higgenbotham as found by the special verdict. The clause on which the question depends is as follows, "That on the 30th of January 1793 the defendant married the plaintiffs daughter, after which the plaintiff gave her the negroes in question to her and the heirs of her body, and in case she died without issue, that is, children of her body, the said negroes to return to the plaintiff."

It is a clear principle that a limitation of personal estate after an indefinite failure of issue is void, as tending to a perpetuity; but it is also a principle that, with respect to personal estate, the courts incline to lay hold of any words which tend to restrict the generality of the words "dying without issue," to mean "dying without issue living at the death."

Thus a limitation to a person *in esse* for life, after a dying without issue is good; because the contingency must happen, if at all, in the life time of the remainderman; and the limitation to him for life restrains the generality of the words "dying without issue." Otherwise if the limitation had been to him in fee or in tail; in that case there would be no such restriction and the limitation  
over

ever would be void. My opinion upon the particular principle, formed on thorough investigation, was expressed in this court in the case of *Pleasant vs Pleasants*; \* and that opinion I now wish to be understood to refer to and adopt.

~~highly probable~~  
as  
Rucker  
~~was~~

There is a circumstance in this case which appears to me to have this restrictive operation; that is to say, that the negroes are to return back to the plaintiff in the event of the daughters dying without children.

It is here to be observed, that the limitation is to the plaintiff himself. It is not to his heirs or representatives, and it cannot reasonably be inferred to have been the donors intention that the negroes should revert to his representatives at a remote distance of time. This limitation then is similar to the limitation for life before spoken of; and restrains the generality of the words "issue of her body," to an event within the period of a life in being.

Without resorting further to the standard of general principles for the decision of this point, there is a case from 1. *Wms.* 534. *Hughes vs Sayer*, which seems decisive of this case; where C having two nephews A and B, devised his personal estate to them, and if either die without children then to the survivor. Here dying without children was restrained to mean without children then living; because the immediate limitation over was to the surviving devisee, as in the case at bar the immediate limitation over was to the surviving father; and the case of *Nichols vs Skinner* *Proc. Ch.* 528, is upon the same principle, and is perhaps still stronger, as the word issue is there restrained on the same reason with the word *children* in the case just mentioned from *Peere Williams*.

My opinion then is that the title of the slaves in question is in the present appellant.

But

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\* Vid. The next case.

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But the verdict of the jury is erroneous, in finding the value of the slaves aggregately, which was certainly meant to be done here under the word "damages." The judgment of the County Court is therefore erroneous as to this point; and in not awarding a *venire facias de novo* to ascertain the separate value of the slaves. Consequently I think that the judgment of the District Court reversing that of the County Court *in toto* ought to be reversed, and a judgment agreeable to the ideas above mentioned entered.

FLEMING AND CARRINGTON Judges.  
 Of the same opinion.

LYONS Judge. The intention clearly was that the slaves should return to the grantor in the event of the daughters dying without leaving any children; which was a reasonable period, and if a Court of Equity had been called upon to execute the agreement the conveyance would have been in that form. The intention was rational, and the limitation confined within proper limits. Therefore there is no question upon the title. But there ought to have been a new writ of enquiry in order to ascertain the values of the slaves. I think therefore that the judgment of the District Court should be reversed; and that of the County Court affirmed as to the title, but reversed also as to the damages; and that a new writ of enquiry should be awarded to ascertain the values of the slaves.

*Per: Cur:* The Court is of opinion, that the judgment of the District Court is erroneous. Therefore, it is to be reversed with costs; and this Court, proceeding to give such judgment as the said District Court ought to have given, is of opinion, that the judgment of the County Court is erroneous, in not awarding a writ of enquiry to ascertain the separate prices or values of the slaves in the declaration mentioned, the jury having found the value of all the slaves in a gross sum. Therefore that judgment is also to be reversed;

ed;

ed; and the suit is to be remanded to the County Court, for a writ of enquiry to be awarded, to ascertain the separate prices of the slaves; and after the execution of such writ of enquiry, for judgment to be entered, for the appellant, for the slaves, or their respective prices.

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P L E A S A N T S

*against*

P L E A S A N T S.

Ans 3:17.

**T**His was an appeal from a decree of the High Court of Chancery in a suit brought by Robert Pleasants son and heir of John Pleasants deceased against Charles Logan, Samuel Pleasants junior Isaac Pleasants and Jane his wife, Thomas Pleasants junior and Margaret his wife, Elizabeth Pleasants, Robert Langley and Elizabeth his wife; Margaret Langley, Elizabeth Langley the younger, and Anne May. The bill states, that the said John Pleasants by his last will devised as follows, "my further desire is, respecting my poor slaves, all of them as I shall die possessed with shall be free if they chuse it when they arrive to the age of thirty years, and the laws of the land will admit them to be set free without their being transported out of the country. I say all my slaves now born or hereafter to be born, whilst their mothers are in the service of me or my heirs, to be free at the age of thirty years as above mentioned, to be adjudged of by my trustees their age." That the said John Pleasants in a subsequent part of his will devised to the plaintiff eight of the said slaves upon the same condition, that he should allow them to be free if the laws of the land would admit of it. That the testator then devised to his grand son Samuel Pleasants

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limitations  
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one third part of his slaves not otherwise disposed of, on the same conditions on which he devised the said eight slaves to the plaintiff. That the testator devised to his daughters Elizabeth Langley the use of all the slaves conveyed to him by Robert Langley and also the slaves sold by the said Robert Langley to John Hunt or Samuel Gordon during the ~~term of her~~ natural life, and after her death to her children upon the same limitations and conditions relative to their freedom, as are mentioned in the other bequests. That the said testator then devised to his son Jonathan Pleasants, when he should attain the age of 21, one third part of all the slaves not otherwise disposed of by that will including his mothers jointure negroes and those given to her by her father to be reckoned as part of the share or third part of the said Jonathan Pleasants in the share of the said slaves. That the testator devised to his grand daughter Jane Pleasants a negro girl named Jenny upon condition, in addition to the general condition first mentioned respecting the freedom of the said slaves, that she the said Jane as one of the children of her deceased father John Pleasants should release all claim to any dividend in a co-partnership mentioned in the said will. That he devised four slaves to his daughter Mary Pleasants; to his grand daughter a negro woman named Pender and her children; and to Elizabeth Pleasants wife of Joseph Pleasants a mulatto woman named Tabb and her child Syphax. That the said testator then devised as follows. "Item I give and bequeath unto my son Thomas Pleasants the remaining third part of my negroes, before directed to be equally divided between my grand-son Samuel Pleasants and son Jonathan, with the same proviso and limitations respecting their freedom as is before mentioned and intended towards the whole by this will given or devised." That the several devisees became possessed under the will aforesaid, and the said Jonathan Pleasants in the year 1777 by his last will, made the

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the following devise " And first believing that all mankind have an undoubted right to freedom and commiserating the situation of the negroes which by law I am invested with the property of, and being willing and desirous that they may in a good degree partake of and enjoy that inestimable blessing, do order and direct, as the most likely means to fit them for freedom, that they be instructed to read, at least the young ones as they come of suitable age, and that each individual of them that now are or may hereafter arrive to the age of thirty years may enjoy the full benefit of their labour in a manner the most likely to answer the intention of relieving from bondage. And whenever the laws of the country will admit absolute freedom to them, it is my will and desire that all the slaves I am now possessed of, together with their increase, shall immediately on their coming to the age of thirty years as aforesaid become free, or at least such as will accept thereof, or that my trustees hereafter to be named, or a majority or the successors of them may think so fitted for freedom, as that the enjoyment thereof will conduce to their happiness, which I desire they may enjoy in as full and ample a manner as if they had never been in bondage, and on these express conditions and no other I do make the following bequests of them." That the testator then proceeds to dispose of his slaves among the following persons to wit, Mary Pleasants, Anne Langley, Elizabeth Langley, Mary Langley, Anne Pleasants, David Woodson, Anne Woodson, Joseph Pleasants, Samuel Pleasants and the plaintiff; again expressing in almost every particular the same positive condition in favor of their freedom. That the said Anne Langley hath been married with May, Margaret Langley with Peasdale, Anne Woodson with Pope, and Mary Pleasants with Logan. That the plaintiff is heir at law and executor of the said John Pleasants

deceased,

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deceased, as well as executor of the said Jonathan Pleasants, and in those characters in the year 17 applied to the Legislature for the manumission of the said slaves; but the Legislature were of opinion that it belonged to the judiciary. That the plaintiff hath been much embarrassed as to the mode of bringing the question before the Courts, as the slaves could not sue at common law, 1. On account of their not being capable of being manumitted, but upon the terms mentioned in the act of Assembly. 2. As they claimed their freedom in the nature of a legacy. That the devises to the defendants were only on condition that they would emancipate them when they arrived at a certain age and the laws would permit it. Of course that they have no title to them, but either the plaintiff is entitled, for a breach of the condition, or as executor, on whom the legal estate vested to perform the will. That there are no debts due from the said John and Jonathan Pleasants now unsatisfied. That the plaintiff hath applied to the defendants to emancipate the said slaves, but they refuse. Therefore the bill prays that the slaves may be delivered up to the plaintiff to be holden in trust for the purposes of the wills of the said John and Jonathan Pleasants; that the Court would direct the manner of their manumission; and for general relief.

The defendant Mary Logan demurred to the jurisdiction; and by answer says that her late husband died indebted to several persons.

Isaac Pleasants also demurred to the jurisdiction; and by answer says that the increase of the slaves devised to the said Jane are under thirty years of age.

Samuel Pleasants likewise demurred for want of jurisdiction; and by way of answer states, that some of those in his possession are under 30 years of age.

Elizabeth

Elizabeth Pleasants, says that Tabb and her increase were given to the defendant by the said John Pleasants in his lifetime as by his letter will appear. And that the will of John Pleasants doth not operate to give freedom to the other slaves.

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The defendant Teasdale denies his responsibility to the plaintiff, either as heir or executor. By amended answer he says, that T, Atkinson has by virtue of a mortgage recovered part of those held by the defendant, and the defendant hath since paid him a valuable consideration for them.

A suit was afterwards brought by Ned one of the slaves in *forma pauperis* against Elizabeth Pleasants widow of Joseph Pleasants, setting forth the clauses of the will of Jonathan Pleasants, stating the act of Assembly authorizing the manumission of slaves, and that the plaintiff is now upwards of 30 years of age; and hath so demeaned himself as to shew that freedom would be conducive to his happiness. The bill therefore prays the court to decree the defendant to release him from slavery.

The Court of Chancery overruled the demurrers, and declared itself of opinion, that, in equity, of the slaves, on whose behalf the suit was instituted, they who were thirty years old or older in the year 1782, when the act authorizing manumission was enacted, were, at that time, entitled. They, who, born before the testators death, were not 30 years old at the time of the decree, would, when they should attain the same age, be entitled to freedom, and that they who had been born since the statute was enacted, were at their birth entitled to freedom: That the plaintiff Robert Pleasants heir and executor as aforesaid, was the proper party to vindicate that freedom. It therefore referred it to a commissioner to ascertain their ages, and to take an account of their profits since their respective rights to freedom accrued. From which decree the defendants appealed to this court.

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WICKHAM for the appellants. If the plaintiffs were entitled to their freedom it was either by the common law, or by statute; and either way they could have asserted it at common law. Consequently their remedy was at common law, and they ought not to have resorted to the Court of Chancery.

It will be said that the legatees are trustees; and therefore that the Court of Equity had jurisdiction upon the ground of a trust. But the history of uses, which were invented to avoid the statutes of mortmain, shews that a Court of Equity only exercises jurisdiction, where the beneficial interest is in one person, and the legal in another. Now it cannot be said that the legatees have the legal estate, and that the beneficial interest, that is the labour of the slaves, is in the slaves themselves. Of course it is not a case which consists with the nature and foundation of trusts.

Perhaps it will be said, that several may join in one suit here; and that, that circumstance will give the jurisdiction. But that will not alter the case; because several may sue at law also. *Coleman vs Dick and Pat.* 1. Wash. 233. Therefore the Court of Chancery ought not to have sustained its jurisdiction, but the decree is erroneous, upon that ground.

Then as to the right of the plaintiffs to have their freedom. It may be proper to premise, that, although it may be true that liberty is to be favoured, the rights of property are as sacred as those of liberty; and therefore, that this cause should be decided on the same principles of law, that other causes are.

Emancipation of slaves was prohibited by the act of Assembly in 1748. *p.* 262. *edit.* 1769: Which act was in force at the time of making this will; and therefore the condition, annexed to the bequests, is void.

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There is a distinction in law, which is well known, between conditions precedent and subsequent. The first must be performed, before any estate at all vests; but it is otherwise as to the latter, because then the condition must happen to destroy the estate which has already vested. In our case the condition was precedent, and it remains to consider, whether the title, depending on it, could ever take effect?

This condition was contrary to the nature of the estate, for it tended to bar the alienation of the property, and therefore was void. *Shep. touch.* 129. 1. *Co.* 83. 1. *Inst.* 223. During all the period, between the death of the testator and the happening of the contingency, it was wholly uncertain, whether the law would pass, or not; and consequently the condition operated as a bar of alienation, for that time; which the authorities declare will render it void. For it is, in effect, but a devise of the slaves in absolute property, with a condition, that the devisee shall not alien. In *Col Litt.* 224 it is said, that a privilege, inseparable from the estate, cannot be restrained; and the right of alienation is a privilege inseparable from the right of property.

But the condition is void, upon another ground; namely, that it was illegal and contrary to the act of Assembly; which having forbid emancipation, every attempt to effect it, was repugnant to the act, and therefore void.

If it be said that the act only respected absolute and not conditional emancipations, the answer is, that the latter is comprehended in the former, for every lesser is contained in the greater. So that this was an attempt at emancipation, which was void on account of its repugnancy to the law.

Perhaps it will be said, that the law permitted manumission at the time, when the emancipation took effect in point of operation, although there was no such law at the death of the testator; and

therefore

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therefore that the case is out of the meaning of the act of 1748. But this is not so; for there is no limitation, for the happening of the event; and the question is not, whether subsequent events can make it lawful? but whether the devise was good upon the face of the will? for posterior events could not make it good, if it were not so at its creation; that is, at the death of the testator. This is evinced in the common cases of remainders of personal estate, where the events may actually take place, within the limits allowed by law, but the remainders will, nevertheless, be void, because too remote in their creation. This principle was adhered to, by the Court in the case of *Carter v. Tyler*; \* in which it was clearly held, that posterior events would not alter the construction from what it ought to have been, at the death of the testator.

Thus then it appears, that during all the period between the death of the testator and the passing of the act of Assembly, the legatees had property to which there was a repugnant and illegal condition annexed; which was consequently frustrated and void.

By the act of Assembly in 1782 for emancipation of slaves, there is nothing which either manumits the plaintiffs in terms or obliges the legatees to do it; for the act has certain prescribed terms and the present case is not within any of them. But the plaintiffs must shew, that they are within the requisites of the act; and this they cannot do.

It is a rule that all acts upon the same subject shall be construed as one act; because the whole are only parts of the same system. Therefore the act of Assembly and that of 1748, are to be taken as one law. It will then be correct to say in the language of 1748, that it is generally true, that there shall be no emancipation; but that there may be certain specified emancipations, according to the act

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\* 1. Call's Reports p. 165.

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act of 1782. So that the provisions of the act of 1748 will still be the general principle; and those of the act of 1782 will only operate as exceptions out of that of 1748. Therefore any case which is not strictly within the terms of the act of 1782 will come within the operation of that of 1748. Thus if a man were to attempt to emancipate his slave by parol, this, not being within the terms of the act of 1782, would be void by that of 1748.

Besides the act of 1782 is prospective, and not retrospective. It was not intended to embrace any prior cases.

Again the act is permissive, and not compulsory. So that the proprietor may do it or not, as he pleases; for there is no obligation upon him; and therefore the legatees may refuse.

But the act of Assembly imposes certain conditions upon the owner who emancipates, such as the maintainance of the young and aged slaves. Now this the proprietor may do or not, as he pleases, and no person can complain if he will not. But the construction made by the Court of Chancery, upon this will, would go to compel the legatees to give this security; for it cannot be dispensed with, if they are emancipated; or else the helpless and aged will be thrown as a burthen upon the public, contrary to the intention and express provisions of the act of Assembly.

The court cannot compel the administrators to emancipate. No person but the proprietor can do it by law, and, for the reasons already given, the court cannot force him to do it.

The decree of the Court of Chancery, does not follow the testators intention. He intended to erect the slaves into a distinct kind of property; that is to say, they were to be slaves till 30, and free men afterwards: but this idea is not pursued by the decree, which has not only changed the law, but the will too. For a mother having chil-

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dren before thirty, those children will be subject to the term of slavery too. The word *hereafter* takes in all future generations.

As the decree of the Court of Chancery is clearly wrong, how will the court mould another? Must it be, that the plaintiffs and their progeny to all generations shall, in succession, be entitled to freedom at thirty? This would be to allow the testator to create a new species of property, subject to rules unknown to the law. But this is what no man can do.

The whole amount therefore is, that the testator has wished to do, what the law will not permit him to do; and, consequently, the attempt is void.

Upon principles of convenience, the construction of the plaintiffs ought not to prevail. For suppose Logan had contracted debts, between the death of the testator and the passing of the law, ought the creditors, who had trusted him on a fair presumption that no law of emancipation would pass, to lose their debts?

The will of Jonathan Pleasants ought to receive the same construction.

With respect to the account of profits, who are to repay the expenses of those that were chargeable? It could scarcely have been intended by the testator, that this burthen should be borne by the legatees.

But the general idea of the country and the practice in the courts of law are opposed to such a demand; and therefore damages are never given, in actions of this kind, by the juries who decide them.

RANDOLPH on the same side. By the act of 1727 §. 3. slaves can only be conveyed as chattles; and as such a limitation of a chattle would be too remote and therefore void, it follows that this is so

likewise

likewise. The act of 1748, instead of curtailing, rather extended the power of emancipation. For prior to that law a man could not manumit his slave.

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WARDEN for the appellee. This was the case of a trust which gave the Court of Chancery jurisdiction. The nature or kind of the trust does not make any difference, in this respect *Saund. trusts*, 14, 18.

This was a trust to perform a certain act, when the trustee should be enabled to do it: Which trust was not inconsistent with law; and the act of 1782, having enabled the legatees to do it, their conscience is affected, and, consequently, they are bound to perform it.

The application to the Court of Chancery, therefore, in order to compel an observance of this equitable obligation, was proper.

The act of 1748 has not the effect, which is contended for, by the other side. It does not *ipso facto* make void the deed of emancipation. On the contrary, the right of the proprietor is extinguished thereby; although, the freedom of the slaves is liable to determine by the officers of Government exercising the powers given by the act of Assembly, and selling the slave. Which not having been done in this case, and the act of '48 being now repealed, it follows that the devise, which, at first, was effectual to pass the testator's right, continues to be effectual.

The decree pursues the intention of the testator; which was, that all above thirty should have their freedom.

The plaintiffs have a right to the profits of their labour. The decree, therefore, as to this point, is right; especially, as it only directs the commissioner to enquire which of them are entitled to their freedom, and to profits; This, in effect,

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is no more, than instituting an enquiry, which of them came up to the cases contemplated by the testator.

The notion of the *perpetuity*, contended for by Mr. Wickham, is without foundation. Because, from a fair construction of the devise, the contingency was confined to a reasonable period.

MARSHALL on the same side. As to the point of jurisdiction, there can be no question, but that the ordinary principles, founded on the general doctrines of trusts apply; and the rather, perhaps, because, being a suit for freedom, the forms of proceeding will not be so strictly adhered to, as in other cases. This was decided in the case of *Coleman vs Dick & Pat*, cited by Mr. Wickham. But it was clearly a trust; and therefore upon that ground, the Court of Chancery properly sustained its jurisdiction. Besides the difficulty of deciding the nature of the case, as whether freedom was actually given, so as that there might be a common law remedy? Or, whether it was not rather in the nature of a contract to be enforced in equity upon the happening of the events? Whether the property was in the heir or administrator? and which of them should perform the act? All these circumstances rendered the resort to the Court of Chancery proper.

As to the question upon the right to freedom, The right of the testator clearly passed by the will. That was irrevocable; although the slaves would not have enjoyed their freedom, had the officers of government chosen to exert their powers, and sold them as the act directed. But as the act of 1748 was repealed, without this being done, on the part of the officers of government, if they had the power in this case, the right of the *paupers* to their liberty continues,

The question then is, whether the condition shall be performed?

If

If not, it must be, either, because it is against law, or because it is an attempt to create a *perpetuity*.

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or  
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As to the first there is nothing *malum in se*, in it; and therefore, it is not void upon any principle of morality: Neither is it void, upon the ground of the statutory prohibition. Before the act of 1748, every person, who pleased might have emancipated his slave; and that statute does not say, that the testator may not give his slave liberty, when the law shall permit. The old rule of devises to a child in *ventre sa mere* is, in principle, not unlike this case. For, according to that rule, an executory devise to such a child by words *de presenti* was void; but it was otherwise, where the devise was future. So here an immediate emancipation was liable to be defeated by the statute, but a future one, like this, was not.

The great question therefore is, as to the *perpetuity*; Now a perpetuity is a condition which may run forever, or to an unreasonable time. But this does not. For the will relates to several subjects; and therefore may be construed severally.

For instance as to those born, the devise is to be confined to a life in being; and for this purpose it may be taken distributively: So as to make the contingency with regard to them, fall within a life in being, or a reasonable period afterwards. Thus where a mother was born at the death of the testator, the most remote limitation would be a life in being, and thirty years afterwards. Which is a period not denied by any book. For the authorities are all *affirmatively*, that it may depend on a life in being and twenty one years afterwards; and not *negatively*, that it shall not depend on a longer time than a life, in being, and twenty one years afterwards. Therefore, as to the mothers born at the testators death, the bequest is good, upon the soundest principles of law.

The mothers born after the testators death may perhaps form a class of different cases; but that  
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Every circumstance shews, that the account directed by the Court was proper.

The act of 1782 operated a clear repeal of that of 1748; and therefore the only impediment, which could be supposed to exist, is removed.

If justice requires it, the Court may compel the Administrators to emancipate; and the legatees, by taking the legacy, bound themselves to perform the trust. Of course they may be compelled to a specific performance of it. For if the testator was himself in that situation, he would be decreed to perform; and in principle, there is no difference.

With respect to the argument of inconvenience, from Logans having contracted debts, if that were the case, the plain answer would be, that the creditors having trusted a contingent estate, must be subject to the contingency.

RANDOLPH in reply. Upon the question of jurisdiction; this was a plain legal question, and if the plaintiff had any right they might have asserted it at law. The nature of the subject did not alter the case; nor did the qualities of the parties as combining the rights of the heir and trustee. In a case concerning lands such an argument would not prevail. you cannot in equity join different rights in one suit; and if you do, it is cause of demurrer. The *paupers* might all have united in one suit at law. Besides numbers alone cannot give jurisdiction to the Court of Chancery. If it be said, that, being a legacy, it was properly sued for in equity, the answer is, that the executor has assented, and, consequently, that the remedy at law was sustainable. It follows therefore that the Court of Chancery had not jurisdiction.

The law of 1727 declares, that slaves shall pass as chattles; and it is most clear, that such a limitation of a mere chattle would be void, as tending to a perpetuity.

It

It is said that the act of 1748 only prohibits immediate, and not future emancipations; but this is not correct; and, before that act, it was not lawful to emancipate.

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That statute was an existing prohibition, at the time of making this will; and, if a chattle had been devised upon such condition, that such a law would pass, the bequest would have been void. For it would have been a condition contrary to law, and therefore void. 2. *Black. Com.* 160.

Executory devises must take effect within a limited time or not at all. Thirty years is too long, and never has been allowed. If it were, you might go on to any extent. The period of a life, or lives, in being, and twenty one years afterwards, is the fixed rule; inasmuch that it has now become a canon of property; and to alter it, would be to shake titles, and unsettle property.

In the present case, the devise is not to take effect within that period, and therefore the limitation is too remote. A law was first to pass; and when that should be, was wholly uncertain. The posterior event did not alter the nature of the case in its origin; it must be decided, by the will, at the testators death; at which time it would have been determined to be void, on account of the remoteness of the contingency.

Upon the whole, the devise is contrary to the policy of the law, as tending to create a *perpetuity*, and annexing conditions contrary to the genius and spirit of the acts of Assembly. It is therefore void; and of course the decree is erroneous, upon the general ground.

But, at any rate, the account of profits is contrary to practice, and the equity of this case in particular; because the defence was reasonable, and therefore the defendants justifiable in making

*Cur: adv: vult.*

ROANE

April Term

1799.

Pleasants

vs

Pleasants

**ROANE Judge.** This is a bill brought, by Pleasants the heir and executor of John Pleasants deceased, claiming title on behalf of the negroes who were the property of the said Pleasants, at the time of his death, and their descendants.

This claim is founded upon the will of the said John Pleasants, dated the 11th of August 1771, and which has this general clause, "My further desire is respecting my poor slaves all of them as I shall die possessed with, shall be free, if they chuse it, *when they arrive to 30 years of age and the laws of the land will admit them to be free*, without their being transported out of the country, I say all my slaves now born, or here after to be born, whilst their mothers are in the service of me or my heirs, to be free *at the age of 30 years*, as above mentioned, to be adjudged of, by my trustees, their age."

He then gives his son Robert the plaintiff eight negroes "On condition he allows them to be free at the age of 30 years, if the laws of the land will admit of it." And, then, devises the residue of the slaves to various persons, under conditions similar to that last mentioned, in the devise to his son Robert.

The will of Jonathan Pleasants (who was a legatee under the will of John Pleasants of one third of his negroes on the same condition) dated the 5th of May 1776 has a general clause respecting the freedom of his negroes, as also particular conditions annexed to each bequest, in substance similar to those, before stated, to be contained in the will of John.

As, however, it does not appear, as well as I recollect, that Jonathan Pleasants had any slaves other than those derived from his father, as aforesaid, and entitled to the benefit of his will, the will of Jonathan may be thrown out of the present case. But, if it were otherwise, I do not think it would make any material alteration in

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y estate, or in the decision, which I think ought to be given.

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After a demurrer by some of the defendants, for that the bill contained no matter of equity, but that the matter of it was proper for the cognizance of a court of law, and answers (which it is now necessary to specify particularly,) the Chancellor, on a hearing, overruled the demurrer, and decreed in favour of the plaintiffs; directing an account, also, to be taken of their profits. It is here to be remarked, that the cause, with respect to the answers, does not appear, to have been matured and regularly set for hearing; but as all parties were willing to try it, upon the general question, which most probably did not, at all, depend upon the particular answers, and more especially, one which, involving liberty did not admit of delay, and cannot be drawn into precedent, as applicable, on the point, to other cases, the decision given in that case, as upon the general question, was not premature; and the decision, under the restrictions now contemplated as subordinate questions, can produce no injury to any of the parties.

In considering the general question, growing out of the will of Robert Pleasants as before stated, we will first consider slaves as a species of property cognized and guaranteed by the laws of this country, and to be considered, with respect to a limitation over (by the act of 1727,) on the same footing with other chattles.

I will also consider, in the first place, the claim of the appellees to their freedom, only, as that of ordinary remaindermen, claiming property in them, and endeavour to test it by the rules of the common law, relative to ordinary cases of limitations of personal chattles. And if their claim will be sustained on this foundation, and by analogy to ordinary remainders of chattles, every argument will hold, with increased force, when

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the case is considered in its true point of view, one, which involves human liberty.

The doctrines of the common law, relative to perpetuities as to estates of inheritance, hold *a fortiori* as to terms for years and personal chattles. If it be contrary to the policy of that law, to render unalienable, for a long space of time, real estates of inheritance, on reasons of public inconvenience and injury to trade and commerce, these reasons apply, with much more force, as to interests of short duration in lands and personal chattles; not only, because the latter are better adapted to the purposes of trade than the former, but also, because of their transitory and perishable nature.

This observation goes to fortify what is so fully established by the books, as to render citation unnecessary; namely, that the policy and reason of the law leans, at least, as strong against perpetuities in personal as in real estates.

The utmost limits allowed by law for the vesting of an executory devise (or as *Fearne* has it, as applicable to personal chattles, *an executory bequest*;) is the term of a life or lives, in being, and twenty one years after. This limitation, then, has become a fixed canon of property; and ought not to be lightly departed from. And the true distinction is, where the event must happen, if at all, within those limits, the executory devise is good; and on the happening of the contingency, the estate will become absolute, in the remainderman.

Thus a limitation to one, *in esse*, in fee or in tail, after a dying without issue, is not good, because the contingency, *the dying without issue*, is too remote. But such a limitation to one, *in esse*, for life is good; because the contingency must happen, if at all, so as to vest the estate, within a life in being, viz. that of the remainderman; that is to say, the limitation in remainder for life restrains the previous disposition, in the

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me manner, as if it had been expressly limited to the remainderman, on the event of dying without issue, in his life time,

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This case seems directly parallel, with the case before us, the happening of the contingency here; i. e. the passing a law to authorize emancipation; standing simply, is too remote, as it may not happen, within 1000 years: But when the testator goes on further, and means the benefit of it to persons *in esse* (for they are the objects of his bounty, and unless it happened within their lives, it might as well, as to them not happen, at all,) this restrains the happening of the contingency, as in the case before put; and makes the executory devise good, at least as to all, who are within the legal limits.

Nay, the doctrine is carried so far, as to terms of years and personal estates (for it is otherwise, with regard to estates of inheritance, in favor of the heir,) that Courts are inclined to lay hold of any words, in the will, to restrain the general words, "leaving issue," to mean *leaving issue at his death*; and thus to support the remainder. As, in the case of *Keely vs Fowler Fearn v. rem.* 370, where those words were so restrained, in a case, where the estate was to return back to the executors in the event of dying *without leaving issue* and to be distributed by them, and £50 were given them for their personal trouble. Here the words were so restrained, in order to reconcile the limitation to the devisee, with the nature of the trust reposed in the executors, and to be executed by themselves, *in their lives*.

The construction, in this case, must be, as it would have been, at the instant of the testator's death, *Doe vs Fonnercau Comp.* 477. And (the event put out of the question, at present, and leaving, for an after consideration, the circumstances of the contingency having actually happened, and its effects upon the case,) as upon the will itself, the



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the estate, limited on the contingency (all express it,) that is to say, the right was good, if the contingency happened within legal limits, in favour of such, as might to enjoy it, and void, if it happened beyond limits.

This brings us to the consideration, whether the limitation can be sustained, as on the construction of the will itself, as to such as might be born during such limits; although it may be to such as might be born, in a remote period.

And I have no doubt but it may.

I have no doubt but that the limitation, on the will itself, may be construed *distri-* so as to be efficacious, as to some of the persons, although it might be void as to future claimants, that is to say, such as claim beyond the limits, in the event of the contingency's happening sooner or later, as the case may be. In the case of *Forth vs Chapman & Wms.* 663, there was a limitation of freehold and leasehold lands in the same manner, to wit, "If the first devisee without issue." These last words, *die without issue*, were construed, under the distinction taken, to be tied up to mean *issue living at death* as to the leasehold land, and consequently the limitation was held good; but, as to the freehold lands, they were not considered as being so restrained, and they received the same construction, by the Ld. Chancellor as if they had been twice repeated.

To come now to the case, before us, as it now stands. The contingency has happened, within the limits. The effect is, that the limitation, from thenceforth become vested, in interest, in the appellees, then *in esse*; and vested in persons, as to all, then, or as they might be born, thirty years of age. As to all the slaves, *in esse*, but under thirty years of age, their right to freedom was complete, but they were postponed.

as to the time of enjoyment. They were in the case of persons bound to service for a term of years; who have a general right to freedom, but there is an exception, out of it, by contract or otherwise.

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What then, after the passing of the act, is the condition of the children born of mothers, so postponed in the enjoyment of their freedom? Are they, at their birth, entitled to freedom? Or are they too, to be postponed, until the age of thirty? The condition of the mothers of such children is, that of free persons, held to service, for a term of years, such children are not the children of slaves. They never were the property of the testator or legatees, and he, or they, can no more restrain their right to freedom, than they can that of other persons born free. The power of the testator, in this respect, has yielded to the great principle of natural law, which, is also a principle of our municipal law, that the children of a free mother are themselves also free. The conditions of the will then, as applicable to such children, if indeed it was intended, or can be construed to apply to them, is void, as being contrary to law; it being an attempt to detain in slavery, persons that are born free. Considering the mothers of such children, by analogy to other persons held to service, it will be found, that a particular law was here necessary; the power of the Legislature, alone, was competent to subject the children of mulatto mothers, held to service till the age of thirty one, to serve till the ages, respectively, of twenty one and eighteen. But this case goes further, and, is an attempt, by an individual to hold to service, till the age of thirty, persons, who, following the condition of their mothers, are born free.

The view of the subject I have now taken, (which will sustain the claim of the plaintiff, by referring to the ordinary doctrine of limitations of personal chattles) will supersede the necessity of a very delicate and important enquiry: Namely,

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ly, whether the doctrine of perpetuities is applicable to cases in which human liberty is challenged?

It is clear, that the restraints, rightly imposed on the alienation of inheritances, to prevent perpetuities are founded principally, if not solely, on considerations of public policy and convenience. That those restraints have gradually been extended to terms for years and chattel interests, and that the utmost tolerable limits in such cases, have not been settled till after much investigation, and a considerable lapse of time. It is also clear, that neither the particular species of property now in question, nor the case of a remainderman (if I may so express it) claiming his own liberty, were in the contemplation of the judges, who established the doctrine on this subject; which therefore may not apply. But this is an extensive question, and if it were necessary to be now decided (but it is not,) it would be proper to weigh the policy of authorizing or encouraging emancipation (a policy which has certainly received in many instances, and partly by the act of 1782, the countenance of the Legislature, at least from the æra of our independence, and must always be dear to every friend of liberty and the human race,) against those secondary considerations of public policy and convenience; which appear to have supported and established the doctrine of the law, on the subject of perpetuities, as relative to ordinary kinds of property.

But it is said the act of 1782, authorizing emancipation, is prospective in its operation, and does not take in the present case. In answer to this, I am of opinion, that the acceptance of the negroes, in question on the condition stated in the will, created an inchoate contract to emancipate on the part of the devisees; which, on the passing of the act, became essentially complete. That an emancipation ought, therefore, to have been made; that the devisees were, thereafter, trust-

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ees, for the purpose of making such emancipation; and that the plaintiffs are right, in coming into a Court of Equity, to enforce the fulfillment of that trust. And this is one answer to the objection on the score of jurisdiction.

It is said too, that as the will speaks of an unqualified emancipation, without respect to bond and security, to prevent aged and infirm slaves from being chargeable to the public,) and as the act of 1782 has required that such security should be given, an act authorising emancipation, in the sense contemplated by the will, has not yet passed; and therefore the condition imposed upon the legatees, is not obligatory.

In answer to this, I am of opinion, that the testator cannot reasonably be supposed, to have contemplated an act of emancipation, making no provision to prevent the persons liberated from being chargeable to the public. That therefore the act, as contemplated, has substantially taken place; and, that a Court of Equity may carry the contract into execution, if in no other manner, at least by throwing the burthen of the indemnity, required by the act of 1782, upon the slaves themselves, and making it a *lien*, upon the liberty granted them; and such an arrangement, it is evident would place the holders, in the same, and no worse condition, than if an unqualified act in favor of emancipation had actually passed. The necessity of making such an arrangement, in this case, shews the propriety of applying to a Court of Equity; because no other Court has adequate power. Which is another answer to the want of jurisdiction.

In what manner the arrangement should be made, in this case, so as to comply with the act of 1782, requiring an indemnification against aged and infirm slaves, becoming chargeable to the public, is a subject, upon which, I have had considerable difficulty. But I am fully persuaded, that the powers, of a Court of Equity, which re-

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gards the substance of things more than forms, are competent thereto; and I now beg leave to refer to the *project* of a decree, which I shall take the liberty of stating, presently, as containing the result of my deliberations, on the subject.

Another ground, upon which, the jurisdiction of the Court of Equity is sustainable, in the present case, is, that it involves the rights of a great number of claimants. So that the joint suit prevents a great deal of litigation and expence; besides involving, in the same common fate, those who stand on one common title. Whereas if separate suits were brought, it might turn out, either upon general or special verdicts, that persons having the same rights, nay even children of the same mother, might one be adjudged to be free, and another a slave. An enormity, which the joint proceeding is wisely calculated to prevent.

With respect to the slaves claimed by Elizabeth Pleasants and by Teafdel, paramount to the will of J. Pleasants, my opinion, in the present case, does not extend to them, so far, as, the title, thereto, is claimed paramount to that will; but such title ought to be considered, as still open, if desired for discussion and decision.

With respect to the debts of the original testator, if any, the original slaves and their descendants are clearly liable. But whether they are liable to the debts of the devisees accepting them, or their right to freedom is lost by a *bona fide* sale, if any such has taken place, are questions which I also consider, as open for the decision of the Chancellor, if required. It would seem to me, however, as at present advised, that if the limitation was good, by the rules of law, the right thereby created would not yield, either, to the claim of creditors or purchasers. But, on this point, I give no decided opinion.

I have now gone through, or touched upon such points in the case, as appeared to me necessary

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to be noticed. There is yet one part of the Chancellor's decree, which I could have wished had not been made. I mean the reference to a commissioner to ascertain the profits of the slaves. We have no precedents, either of the Courts of England, or this country, to guide us. In the former country, indeed, no such case could occur; because slavery is not there tolerated; and, in this country, I believe, no instance can be produced of profits being adjudged to a person held in slavery, on recovering his liberty. Among a thousand cases of palpable violations of freedom, no jury has been found to award, and no court has yet sanctioned a recovery of the profits of labour, during the time of detention. Yet it must be admitted, that juries are often excellent Chancellors. But this is not a palpable violation of freedom. To say the least, it is a very nice question, whether these plaintiffs be entitled to freedom or not? And ought the court, in such a doubtful case, to award that, which the whole equity of the country, flowing through a thousand channels, has not yet awarded, in a single instance? It seems to be a solecism, to award ordinary profits to recompence the privation of liberty; which, if it is to be recompenced, the power of money cannot accomplish.

But what, with me, is decisive on this point, is this, that as, in my opinion, all the children born of the female negroes, in question, since the passage of the act of 1782, are, and were thenceforth entitled to freedom by birth, the burthen of rearing such persons, during their infancy (which must be borne by the legatees,) will form perhaps not an unreasonable offset against the profits of those, who were capable of gaining profit by their labour.

I have thus endeavoured to make known the grounds upon which my opinion is founded. I entirely concur in the result of the Chancellor's decree, except in the particulars, in which, I

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have already stated my opinion, to be different. As it is the policy of the country to authorize and permit emancipation, I rejoice to be an humble organ of the law in decreeing liberty to the numerous appellees now before the court. And this upon grounds, as I suppose, of strict legal right, and not upon such grounds, as, if sanctioned by the decision of this court, might agitate and convulse the Commonwealth to its centre. I

The general outlines and substance of the decree, which I think should be made in this case, are as follows.

That, whensoever, and as soon as the appellee Robert Pleasants or any other responsible person or persons, shall under the direction of the High Court of Chancery enter into bond with sufficient securities in such Court or Courts under such penalty or penalties, as the said High Court of Chancery shall direct, with condition to indemnify and save the public harmless, with respect to all such of the slaves in question as were *in esse*, at the time of the passage of the act of 1782, authorizing emancipation, and shall be deemed to fall within the provisions of that act, relative to old age and infirmity, with an exception however, with respect to such indemnity, as to such of the said slaves as may be under the age of thirty and may be deemed infirm, for the period or periods of time it may respectively require them to accomplish the said age of thirty years, and during which they will remain, at the proper charge of the legatees or holders under the will or wills, in question. Or whensoever, and as soon as the Legislature of this Commonwealth shall, if it ever shall remit the indemnity above supposed, necessary to be given. And when, in addition in either case, it shall appear to the satisfaction of the said High Court of Chancery, either that there are no legal and subsisting debts of the said John Pleasants the testator, or that being so, a sufficient fund has

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been raised, by the common labour of the said slaves to discharge the said debts, which in that event, saving the right of the legatees as aforesaid, the said Robert Pleasants or any other trustee to be appointed by the said court are authorized to do; and if it shall be found that the testator Jonathan Pleasants possessed, at his death, any slave or slaves other than those derived under the will of the said John and now in question, then a like provision to be extended to them in respect of his the said Jonathan's proper debts, if any; it shall be the duty of the said High Court of Chancery to emancipate and set free the said slaves respectively; subject nevertheless to the rights of the legatees and those claiming under them to their labour, until they shall severally have attained the age of thirty years, in like manner and to all intents and purposes, as if they had been respectively emancipated, conformably to the said act. But if such indemnity be given or remitted, as the case may be, within a reasonable time, to be adjudged of by the said Court, it shall in that event be lawful, for the said Robert Pleasants or any other trustee or trustees to be appointed by the said Court to possess the whole of the said slaves (subject as aforesaid) in trust, to raise a sufficient fund to answer or procure the said indemnity and satisfy the debts, if any, as is aforesaid; and as soon as those purposes are accomplished, in the opinion of the said Court, it shall have power and is hereby directed to manumit the said slaves, subject, as is aforesaid, in the manner above directed; adopting and pursuing, in either case, such measures as are provided by the said act of 1782, as far as may be, for preserving the evidences of their title to freedom. Provided, that nothing, herein contained, shall be construed to extend to any of the slaves, in question, born since the passage of the act of 1782, and who are entitled to freedom, by birth and not by emancipation. Nor to the paramount titles set up, by Elizabeth Pleasants and Daniel Teafdel,



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to a part of the said slaves. Nor to the question, whether the said slaves are liable to pay the debts of the original legatees, or those who claim under them? Nor, if sold to bona fide purchasers, whether, such sale be valid to bar the right of liberty now asserted? Nor to bar or affect the title or titles of any person or persons whatever, other than the said testator or testators, as the case may be, and those claiming under them respectively. All which questions ought to be considered, as open and undecided, as if the present decision had never been made.

**CARRINGTON Judge.** I concur with the decree of the Chancellor, so far as it goes to overrule the demurrers of two of the appellants. For it was unquestionably a proper subject for the interposition of a Court of Equity, and strictly within its jurisdiction. I am also of opinion with the Chancellor, that the plaintiff, neither as heir at law, executor, or trustee, could proceed, at law, as for a condition broken; He having parted with his powers, by his own assent and distribution of the slaves amongst the legatees.

But I differ widely from the Chancellor with respect to the exercise of his jurisdiction. Perhaps, I do not understand the principles and reasoning; upon which, he founds his decree; but the result is, clearly, contrary to both law and Equity.

It is contrary to law; because he has not preserved the principles of the only law giving owners power to emancipate. It is contrary to Equity, because it either fixes, on the public, a certain expence, or leaves a number of these people to starve, for want of subsistence.

Until the year 1748, every owner of a slave had a right to emancipate him, upon the principle of having a right to dispose of his own property as he pleased; but the Legislature, conceiving that inconveniences arose therefrom, passed a law to prevent the manumission of slaves, except for

meritorious

meritorious services, to be judged of by the executive. Which law remained unaltered, until the year 1782; when the act passed allowing emancipation upon condition that the public is indemnified against loss and expence. This is still the law, and ought to have been attended to by the Chancellor in forming his decree.

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I perceive no difficulty in ascertaining the meaning and intention of both the testators; who discover a strong desire to emancipate their slaves immediately on their deaths. But as the then existing laws would not permit, they did all they could towards effecting it, by directing, that it should be done, as soon as the laws would authorize it; and, in the mean time, making temporary devises of them amongst their children and friends, with a positive condition annexed, that the different devisees should liberate them, as soon as by law it should be allowable, on their respectively attaining to the age of thirty years. Which period was probably fixed upon, with a view to the labour of the slaves affording some compensation, for the trouble and expence of taking care of the aged or infirm, and rearing the children.

The question, then, is, whether these devises are sustainable? I hold that they are; and not liable to the rule respecting chattel interests, limited on more remote contingencies, than the law allows. For the subjects of the devises are different; inasmuch as in the devise of chattels, property only, is concerned; but liberty is devised in this case. Both sacred rights indeed; but the rules of limitation not necessarily the same with regard to them.

In point of fact, the contingency actually happened, within a very small space of time. For, within six years, from the date of Jonathan Pleasants' will, a law was passed enabling owners to emancipate their slaves.

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But, by this law, the owner, who would manumit his slaves, must give security to indemnify the public, against the expence of supporting such as are aged, infirm, or infants. A provision which the decree has not attended to, although it certainly, ought not to be overlooked. But I do not think, that the holders, in the present case, should be compelled to give it themselves. On the contrary, I think the emancipation should be upon the condition, that the present friend of the appellees, or some other person or persons, will procure the security required by law. Which will be consistent with the conduct of the Legislature in two recent instances; namely, in the case of Mayo's slaves, in which the executors were by an order of the Court of Chancery, founded on the law of 1787 for emancipating those slaves, directed to reserve funds enough for the purpose. The other case was that of Moreman's slaves. In which case, the act of Assembly, for emancipating of them, directs, in so many words, that the executor, or some other person, should be bound to indemnify the public.

Having mentioned my opinion upon the general question concerning emancipation, I shall now state what I conceive to be the periods, at which, the appellees will be respectively entitled to their freedom, upon the conditions just explained. I think they are to be emancipated in the following order. That is to say, all those *now* above the age of thirty years immediately; and the increase of mothers above the age of thirty, at the term of the birth of the child, are also to be emancipated immediately. But those born of mothers, not thirty years of age at the birth of the child, are not to be liberated, until they arrive at the age of thirty; and the same rules are to be observed, with respect to their progeny, born, during the servitude of the mothers. Which seems to me to satisfy the meaning of the testators.

The decree for profits is I think new and unprecedented. Besides the account, when the  
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reductions for the trouble and expence of taking care of the aged and infirm, and for rearing of the children is made, would probably yield very little. Under every point of view, therefore, I am against the account; and think the decree should be corrected in that respect likewise.

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Some other alterations are wanting still. For all the defendants have not been fully heard. Two demurred, and as to them the cause was properly heard. But the cause was not in a proper situation to be heard as to Elizabeth Pleasants; and, in the case of Ned, there was no answer, nor the bill taken for confessed, after the proper previous steps. Therefore, I think, that, as to those parties, the cause should go back to the Court of Chancery, in order, that the proper proceedings may be had therein with respect to them; so that they may have an opportunity of supporting their titles, if they can do so.

Besides no attention has been paid to creditors.

Although it may not be the case, yet it is possible, that John and Jonathan Pleasants owed debts, which are still unpaid. If there be any such creditors their rights should be secured.

The holders of the slaves, may owe debts; and it is expressly said to have been the case of Logan. Perhaps too some of them may have been mortgaged, or sold to innocent purchasers, upon the faith of possession, and apparent ownership in the legatees. Now, although I will not say, at present, whether the debts and contracts of the legatees ought or ought not to affect the slaves, because the case is not before me, yet the door should not be shut to enquiry, and such creditors and purchasers excluded from shewing, if they can, that they have an equitable lien.

Upon the whole, I think the decree should be reversed; and a new one entered, conformable to the opinion, which I have delivered.

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**PENDLETON** President. On mature consideration, I am of opinion, that the suit in Chancery cannot be sustained upon the ground of the appellees claim as heir at law to take the slaves for the condition broken, it being the practice of that court to relieve against forfeitures and not to aid or enforce them. Neither will his claim, as executor, have that effect; because, having long since assented to the several legacies and bequests of these people, he had fully executed his power over the subject. At the same time, these characters furnish a commendable reason for his stating the case of these paupers to the court; and it ought to be heard and decided upon, without a rigid attention to strict legal forms, since it can be done, without material injury to the other parties.

And upon a view of the case, I am of opinion, that the paupers are not legally emancipated under the wills of the testators and the several acts of Assembly; but if they are entitled to relief, at all, it is on the ground of a trust created by the will's, that their manumission should take place, upon a contingent event, which it is alledged has essentially happened, but requires an act to be done by the possessors, who refuse to perform it, and a Court of Equity can, alone, enforce the execution of the trust, or make the necessary arrangements therein; and therefore, that there is no error in so much of the decree, as overrules the demurrers of the appellants **Mary Logan, Isaac Pleasants and Samuel Pleasants jr.** for want of jurisdiction.

But, as the cause was only set for hearing on the demurrers, and not on the answers and exhibits, it would seem, that, regularly, that court could not, in that state of the proceedings, have proceeded to a hearing and decree upon the merits: Nevertheless, upon the principle, before stated, of not adhering to strict form, in this proper case where essential justice can be done; (and

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The answers of these three defendants put their defence upon the wills and acts of Assembly, without alledging any facts to influence their construction, and the counsel, on both sides, have argued the merits, at large,) the court have, in this case, for convenience, without meaning to fix a precedent, considered and determined the general question; leaving, however, the claims of Elizabeth Pleasants and Daniel Teasdale to part of the paupers, under titles paramount to the will of John Pleasants, and the question, how far those in the possession of Mary Logan shall be liable to the debts of her husband, open for discussion in the Court of Chancery, upon proper statements of the facts, and exhibits relative thereto; which they are to be at liberty to introduce in that Court.

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Although the testators, at the time of making their respective wills, had not power to manumit, and if they had devised them upon condition that the devisees should emancipate them immediately, the condition, being unlawful, would have been void, and the property vested; yet a condition, that they should become free when the law would permit it, was not of that sort,

To consider this freedom in the light of a limitation of the remainder of a chattel, upon a contingent event, it would seem to assimilate to the case of such remainder, limited over upon a general *dying without issue*, and therefore, void; since the Legislative permission might never be given; might be afforded one hundred years after; or at any earlier period. And the will in the other case, is allowed to be the rule of judgment, unaltered by the event, although the *dying without issue* shall happen in a reasonable time; all being involved in one fate. But I am of opinion, that it would be too rigid to apply that rule, with all its consequences, to the present case; and that a reasonable principle ought to be adopted, to suit its peculiar circumstances; which is, that, if the event happens whilst the slaves remain in the possession

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session of the family, without change by the intervention of creditors or purchasers, since the contending parties would be those whose interests had been contemplated by the testators, the bequest ought to take place: But that the case of such intervening claims, not being in the view of the testators, it ought to be considered, how far they should, in equity, prevent the devise of the manumission from taking effect. So far therefore, as concerns the family, I should have had no difficulty, in decreeing in favour of the paupers, if the wills had directed a general emancipation, when permitted, and the Legislature had permitted it, without any condition annexed to it.

The difficulty arises from the testators not having directed a general manumission, when permitted by law; but a limited one, directing all future generations of these people, born whilst their mothers were under thirty, to serve to that age founded no doubt, upon a consideration of the interest of his family, and that of the slaves.

On this middle state the Legislature have not declared their will; except in a case, which assimilates to this, namely, that of mulattoes, the descendants of a free white woman by a negro, all of whom, born whilst the mother was under thirty one years of age, were to serve to that age in all generations, by an act passed at an early period, and continued in force until 1764, when it was repealed; which is not conclusive, as to their will, upon the present subject. On the other hand the Legislature have permitted a voluntary unlimited emancipation, but annexed a condition that the person liberating shall support and maintain all such, as in the judgment of the Court *or not of sound mind or body* or above 45, or males under the age of 21, and females, under 18; to be levied upon him, or his estate, by order of the court in case of neglect or refusal. On these terms the testators have not declared their minds, wh

ther

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ther they would, or would not, have compelled the devisees to emancipate, subject to them.

Under this difficulty; the Court endeavored to model a decree, to affect the purpose of the paupers, without essentially violating the wills or the laws; and was of opinion, that the limited manumission, according to the modifications in the wills of the testators, could, alone, take place and be decreed; and would have found no difficulty in making such a decree, from the silence of the Legislature, on such a state of servitude (since it might in future act upon the subject, and either continue or discontinue it,) but had insuperable difficulty upon the terms imposed by the law; which may be important. The person empowered to emancipate, had an opportunity of judging, whether he would do the act upon that condition? In the present case, the devisees, the legal proprietors, oppose the manumission, and the question is, whether they shall be compelled, under the wills, to do the act, be subject to new hardships, not imposed on them by the wills, and on which no person can say, what would have been the decision, had the testators contemplated the subject?

On Moremans will an act passed in 1787, reciting his will in 1778, by which he devised certain slaves by name to each of the different legatees to enjoy their labor; the males to 21, the females to 18, and then all to be free; except some, devised to his wife, which she was to have for life, and then they were to be free; and except another parcel, who were to be immediately free. The act divides them into four classes.

1. Those who were between 21 and 45,
2. Those devised to the mother then dead; which two classes, were to be immediately free, as if born so; and their increase were also to be free,
3. All under 21 and 18 were to be free, when they attained those ages, and the increase of those



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to be free at a future period, were to be free with the parents.

4. Those above 45, to be free, when Johnsa the executor, or any other should enter into bond with approved security to the County Court with condition that they should not become chargeable to the public. This was in spirit pursued by a majority of the Court; and a decree has been formed, to the following effect.

“ The court is of opinion, that there is no error in so much of the decree of the said High Court of Chancery as overruleth the demurrers of the appellants Mary Pleasants, Isaac Pleasants and Samuel Pleasants junior for want of jurisdiction in the said court, but that there is error in some of the principles on which the decree upon the merits is founded and part of the reasoning, thereupon, is not approved by the court: Therefore it is decreed and ordered that so much of the said decree as overruleth the said demurrers, be affirmed, and that the residue of the said decree be reversed. And the court, proceeding to make such decree as the said High Court of Chancery should have pronounced, is of opinion, that altho’ the testators at the time of making their respective wills, had not power to manumit, and if they had devised them upon condition that the devisees should emancipate them immediately, the condition being unlawful, would have been void, and the property vested; yet the condition that they should become free when the law would permit it, was not of that sort. That to apply the rule respecting the limitation of the remainder of chattel upon too remote a contingency, with all its consequences, to the present case, would be too rigid, but that a reasonable principle ought to be adopted to suit its peculiar circumstances which is this, that if the event happens which the slaves remain in the possession of the family without change by the intervention of creditors

“ or

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or purchasers, since the contending parties would be those whose interest had been contemplated by the testators, the bequest ought to take place; but that the case of such intervening claims, not being in the view of the testators, it ought to be considered how far they should in equity prevent the devise of the manumission from taking effect. So far therefore as concerns the family, the court would have had no difficulty in decreeing in favour of the paupers, if the wills had directed a general emancipation, when permitted, by law, and the Legislature had permitted it, without any condition annexed; but a difficulty arises from the testators not having directed a general manumission, when allowed by law, but a limited one, directing that all future generations of these people, both whilst their mothers were under thirty, should serve to that age; founded, no doubt, upon considerations of the interest of his family, and that of the slaves; on which middle state the Legislature have not declared their will, and on the other hand the Legislature have permitted an unlimited emancipation but annexed a condition imposing upon the person liberating, certain terms for the sake of the community, of which the persons making voluntary manumissions might judge, whether they would do the act upon these terms, and use their pleasure, and on these terms the testators have not declared their minds; whether they would or would not have compelled the devisees against their inclination, to emancipate subject to them. Under this difficulty the court endeavoured to model a decree, to effect the purpose of the paupers, without essentially violating the wills; and is of opinion that the limited manumission according to the modifications in the wills of the testators, can alone take place and be decreed, and that the terms for securing the public against the maintenance of the aged or infirm, cannot be equitably imposed upon the devisees. It is

“ therefore

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" therefore further decreed and ordered that all  
 " the slaves of which the testators were possessed  
 " as their property at the time of their respective  
 " deaths not subjected to the claims of the credi-  
 " tors or purchasers before stated, and who are  
 " now above the age of forty five years and their  
 " increase born after their respective mothers had  
 " attained the age of thirty years (so soon as Ro-  
 " bert Pleasants the executor, the several trustees,  
 " or any other person shall in the courts of the se-  
 " veral counties in which the said slaves respective-  
 " ly reside enter into bonds with approved sure-  
 " ties payable to the Justices then sitting in each  
 " court, and their successors, with condition that  
 " the said slaves shall not become chargeable to  
 " the public, or enter into one such bond for the  
 " whole in the General Court,) and all such as are  
 " now above thirty and under the age of forty five  
 " years immediately shall be emancipated and let  
 " free to all intents and purposes, in like manner  
 " as if they had been born free, and that all who  
 " are now under the age of thirty, and whose mo-  
 " thers had not attained that age at their birth,  
 " and all their future descendants, born whilst  
 " their mothers are in such service, do serve their  
 " several owners until they shall respectively at-  
 " tain the age of thirty years, and then be in like  
 " manner free; and when their freedom shall se-  
 " verally take effect according to this decree, there  
 " shall be delivered to each of them, by their re-  
 " spective masters or mistresses, a certificate writ-  
 " ten or printed, attesting their freedom, in such  
 " form as shall be directed by the said High Court  
 " of Chancery. That no account ought to be tak-  
 " en of profits, it being unusual in such cases, and  
 " less reasonable in this very difficult one. And  
 " the cause is remanded to the said High Court of  
 " Chancery for a state to be taken of the present  
 " condition of the several persons, and their rights  
 " ascertained, according to the principles of this  
 " decree; also for further proceedings to be had,  
 " respecting the claims of Elizabeth Pleasants and

" Daniel

‘ Daniel Teasdale to part of the slaves, under titles paramount to the will of John Pleasants, and the claim of the creditors of Charles Logan, upon proper statements of the facts and exhibits relative thereto; which they are to be at liberty to introduce in the said court.”

## B R A X T O N

*against*

## A N D R E W S.

**B**RAXTON appealed, from the Court of Chancery, to this court; and then died. As no person would take administration on his estate, it was committed, by the Hustings Court, to the Serjeant of the city, agreeable to the act of Assembly. *Rev. Cod. 176. sect. 61.*

*A scire facias*, was moved for against the Serjeant, to revive the appeal.

The court thought it was a case not provided for, by the act of Assembly. And nothing was taken by the motion.

N. B. The cause lay over for several terms; and, at length, was finally abated.

If the appellant dies,

and no person will administer on his estate, so that the court orders the Serjeant to take possession of it, no *scire facias* to revive the appeal, lies against the Serjeant.

M'CONNICO

# M'CONNICO & al. EXRS. of HOLLOWAY.

against

CURZEN.\*

A consignee, who receives no orders to the contrary, may sell on the customary credit of the place.

The executors of a consignee will not be liable for

outstanding debts, unless there be gross negligence.

And the appointment of agents to collect is *prima facie* evidence of due diligence. So that the consignee must afterwards prove the negligence.

Where the evidence was defective as to a particular item, no decree as to that item was made.

Interest not demandable on an unliquidated account.

Specie during the war, was not an article of cur-

**T**HIS was an appeal from a decree of the High Court of Chancery, where Curzen brought a bill against Holloways exrs. stating, That in 1780 he consigned the sloop *Hero's revenge*, with her cargo, to Holloway at Petersburg in Virginia, to be disposed of by him; which he did, some time in the ensuing year, for £ 205,072:1 of which £ 7726:2:4, by Holloways own statement appears to be due; and that the plaintiff is entitled to receive the same, in tobacco, at £ 70 per cwt. as will appear by Holloways letter of the 19th of August 1781. That besides the above balance the plaintiff claims an account for 800 weight of coffee part of the said cargo, kept by himself, and to be paid for in tobacco at the same rate. That the coffee was then worth £ 3720 paper currency. That, on the 18th of April 1781, Holloway transmitted to the plaintiff, then resident in Baltimore in Maryland, notes for 143 hhds. of tobacco, amounting, inclusive of warehouse expenses, to £ 118,926;18; pretending that it was received from the purchasers of the consignment. That the whole of this tobacco, was shortly after, destroyed by the British; and the plaintiff believes a considerable part of it, being the tobacco of Holloway and not of the plaintiff, was fraudulent-ly

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\* The above case was accidentally omitted, in publishing the cases of the October Term 1799. It is therefore inserted now.

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rency, but a commodity at market; and items of specie, advanced during that period, should be extended, at the value, at the time of the advance made.

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ly sent, when Holloway apprehended the British would destroy it. That in 1780, the plaintiff, likewise consigned to Holloway, the schooner Blossom, with her cargo; the nett proceeds of which amounted to £ 33461:16; of which the plaintiff has received 33171 dollars, continental money, leaving a balance due the plaintiff of £ 23510:10, payable in tobacco, at £ 70 per cwt. The bill therefore prays an account, and payment of the balance; and for general relief.

M'Connico  
vs.  
Curzen.

The answer admits the said sum of £ 7726:2:4 paper currency, on 21st August 1781, and that the same was payable in tobacco at £ 70 per cwt. It also admits the coffee to have been on hand, upon the 19th of August 1781; but refers to an account to shew how it was disposed of. Insists that the tobacco notes, remitted were the property of the plaintiff, and not fraudulently sent; but that they were honestly remitted, the plaintiff having then actually sent for 100 hhds; and, at that time, that there was little or no prospect, that the British would go to Petersburg. That the cargoes were sold at the customary credit of the place, as no directions to the contrary were given; and there are sundry outstanding debts, due from the purchasers. That proper steps have been taken to collect the same, but several of the defendants have plead the act of limitations.

The Court of Chancery referred the accounts to a commissioner; who allowed the plaintiff the charge for the coffee and the other debits; but credited Holloway for the 143 hhds. of tobacco sent; and reported a balance of £ 28929:9:7, payable in tobacco, at £ 70 per cwt. amounting to 41,328 lbs. tobacco, with interest, on the whole balance, from the 1st of September 1781 until paid. The commissioner refused to make any allowance to the executors, for the outstanding debts, there being, as he alledged no proof of proper steps taken to collect them; and Hullo-

way .

M'Connico  
vs  
Curzen.

way when he rendered his accounts had not excepted them.

The plaintiff excepted to the report, for having credited the 143 hhds tobacco.

The defendants also excepted to the report. 1. Because the outstanding debts were not allowed, as the proper steps to recover them, had been taken; 2. Because the estate could at most, only have been liable for actual ascertained failures; and none such were shewn, on the contrary, in one instance, that of Bannister, the whole dispute was, whether it should be paid in money, or the certificate given for it, by the public? for whose use the commissioner as executor of Bannister alleged it was bought. 3. Because the commissioner had debited the defendants with the coffee. 4. Because the commissioner had turned a *debit* of 20 half Johannes, into paper money, at 140 for one, and then recharged it in tobacco at £70 per cwt. 5. Because interest was allowed from September 1781.

The Court of Chancery disallowing the plaintiffs exception, established the credit to the defendant for the 143 hhds tobacco; and declared in opinion, That the outstanding debts ought to be credited, if the proper steps were taken to recover them, and they would now give a power of attorney to the plaintiff to collect them. That the half johannes ought to stand in money, and reserving the question of interest, recommitted the report to the commissioner,

The commissioner in his second report corrected the charge as to the half johannes, stating it at £48 specie; but in other respects he reported the balance, as in his former report. In his remarks he stated, *That* the defendants had filed a list of the outstanding debts, with a power of attorney to the plaintiffs to collect them. *That* Holloway died, on the 19th of October 1781, soon after which an agent was appointed to manage

the

the estate; and when he left Peterburg another agent was appointed; both persons of known ability; and therefore that the defendants insisted, they had done all that was incumbent on them. *That* Banister's debt was for a hhd. of rum bought for public use, and that the agent would not accept of the certificate. *That* the defendants had produced a memorandum in the hand writing of Stewart, who is now dead, but was a clerk to Holloway, in order to shew, that the coffee (with many other articles) was sent into the country, out of the way of the enemy; and, as their testator died soon after, that they presume it was lost.

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vs  
Curzen.

Holloway's letter, to Curzen, of August 19th 1781, says, he has about 800 lbs. coffee on hand, of which a bag is kept for the plaintiff according to instructions.

Stewart's memorandum referred to in the report is headed as follows.

*A list of sundry goods, lodged with sundry persons belonging to John Holloway deceased 1781.*

And in it is an entry in these words.

"In the hands of Baker and Blow, some sugar and coffee, at Wine-Oak, belonging to Richard Curzen, S. I. R. to be sent him."

And another in these words.

"Five bags coffee, belonging to Richard Curzen, 2 barrels salt do. James Wilson. Sold John Pride, he says.

There are various letters, accounts &c. in the record.

The Court of Chancery decreed the defendants to pay the balance, reported by the commissioner, in the last report, to be due to the plaintiff, with interest from the 1st of September 1781, "upon payment, by the plaintiff, to the defendants of  
" forty



**M'Comico**  
*vs*  
**Curzen.**

"forty eight pounds of current money of Virginia,  
 "for the twenty half Johannes afore said, with in-  
 "terest thereupon from the same first day of Sep-  
 "tember."

The defendants appealed to this Court.

**CALL** for the appellants. Where a consignee, who has no orders to the contrary, sells goods on the customary credit of the place, he is justifiable by the known rule of mercantile law; and therefore he is not liable for failures or accidents not arising from his own misconduct.

In the present case, the goods were sold on the customary credit, and therefore, according to the rule just mentioned, Holloway was not liable for future losses, not arising from his misconduct; especially as it appears, that the plaintiff actually approved of what he had done.

There is no ground for imputing the subsequent losses, if any have taken place, to the misconduct of the consignee or his executors. Not the first; because the sales were, chiefly, made in 1781, and the debts, from the situation of the country, could not be collected during his life time, as he died in October 1781; and therefore, no blame attached on him: Not the second; because, if some little time, for the funeral, the qualifying of the executors, their making themselves acquainted with the testators affairs, and for the inclemency of the season, is allowed, it will be found, that they could not have been in a situation, to have commenced the collection, until the spring of 1782; by which time the six months act of limitations had barred the claims; and therefore, no blame attaches on the executors, either.

But the fault was in the plaintiff himself. For the executors could not, regularly, have proceeded to collect, without authority from him; to whom the debts belonged, and who might have them collected, or not, as he thought proper. He

P.P

did not, give this authority though, or call for the debts. But he ought to have done one, or the other; and therefore, if there has been any improper delay, it is imputable to himself.

M'Conaite  
vs  
Curzen.

The executors, however, used as much diligence as the nature of things would admit of. They appointed agents to manage the estate and collect the debts: Which agents proceeded in the collection, as well as they could; and, if they failed in their attempts, it was the misfortune of the plaintiff, and not the fault of the executors; who did more than their duty required; and therefore, instead of meeting with reproach, they have merited the thanks of the plaintiff.

But it is, certainly, a proceeding of the first impression, to attempt to subject the executors to a loss of the debts, when the confignor appears to have taken no proper steps, to recover them. The principles of universal justice demand, that the debtor should have been first discussed; because he might have made satisfaction; and then there would have been no ground, even in pretence, for complaint against the confignee or his executors; who could, at most, only be liable for culpable negligence. But the plaintiff does not venture to charge them with any: Nor, indeed, could he; for he was, throughout 1781, willing, that the balances should remain in the hands of the debtors.

It is no argument to say, that Holloway did not in terms object to bad debts, when he returned the accounts to the plaintiff. For that was unnecessary; because the law implied it. Besides, in his letter of the 19th of August 1781, he says, he cannot make the accounts more accurate, owing to the confusion his books and papers were in, from the situation of the country. Which shews he was merely making a general estimate, for the plaintiffs satisfaction, without meaning to descend to particulars. In such a state of things, an ex-

ception

M'Connico  
vs.  
Curzen.

ception was not to be looked for by the one, nor thought of by the other.

The coffee was clearly an improper charge against the estate; because the memorandum of Stewart shews, that part was deposited with Baker and Blow to be sent to the plaintiff, who had written for it; and that another part was deposited with Wilson in the country, to be put out of the reach of the enemy; and that it was afterwards sold to Pride, and not kept by Holloway for himself, as the bill supposes. The conduct of Holloway therefore was perfectly correct; and of course nothing like misconduct, with regard to it, can be imputed to him; but this article stands involved in the common calamity of the times, which the plaintiff must bear, as he has nothing to object, with respect to it, in the conduct either of the consignee or his executors.

Nothing can be more untenable than the attempt to subject the estate to the payment of Banisters debt. For it is not pretended to be lost, but the whole question was, whether a certificate or money should be received. Of course there is not the slightest colour for this charge. Because if Banister bought the rum for the public, it is a debt due from the public; and therefore the plaintiff must receive payment in the mode, in which other creditors of the public are paid. At all events, it is a matter between the plaintiff and the public, or the executors of Banister, and not between the plaintiff and the defendants.

The claim of interest on the part of the plaintiff cannot be supported. It is contrary to the whole course of mercantile proceedings, to demand interest upon an unliquidated balance, and a Court of Equity never allows it. On the contrary, interest, being entirely in the discretion of the Court, is never given, unless the defendant, *ex æquo et bono*, ought to pay it; which cannot be affirmed of the defendants, in the present case; from whom it does not appear, that  
any

any demand was made, until several years after their testators death. But what renders the claim for it, more exceptionable is, that the plaintiff had, late in 1781, consented, that the debts should remain in the hands of the debtors; of course it would be extremely unjust, to allow him interest upon money, which has never been collected, and which remained in the hands of those, who owed it, with his own consent. This too, from the moment the account of sales was returned, without allowing a reasonable time for the collection; although it is manifest, from the state of the country, as well as from other causes, that, notwithstanding the debtors might have continued able and willing to pay, no industry could have produced satisfaction, until long afterwards.

McConnico  
vs  
Cürzen

Whether the mode, adopted by the decree, of selling the half johannes be correct or not, is submitted to the Court. But it appears unconscionable to say, that an advance of that kind should only stand at its nominal amount, when it must have been a favor, and the specie would have commanded a much greater price in exchange for the currency of the day.

*Per: Cur.* The court is of opinion, that the appellee, having consigned his goods to Holloway for sale, without particular instructions not to sell upon credit, the latter was at liberty to use his own discretion on the occasion; in the exercise of which, he appears to have acted fairly and prudently, so as to have met the approbation of his principal: And therefore the outstanding debts were the property, and at the risque of the appellee, and not chargeable to the factor, or his representatives; unless, having undertaken the collection, they were guilty of such gross negligence, in equity, ought to charge them: Which cannot be imputed to the factor, who died so soon afterwards; nor to the appellants, who appear, from the facts stated in the Masters second report, to have used proper diligence, in employing agents

of

**M'Connico**  
*vs.*  
**Curzen.**

of ability and integrity to make the collection, and to have given probable reasons for its failure: And therefore the appellants are entitled, at present to a credit for the amount of the outstanding debts. That as to the eight hundred pounds of coffee, the price of which is claimed by the appellee, there appears, at this time, no ground to charge the appellants for that article; since the statement made by Stewart respecting it, to which the answer refers, is unsatisfactory for a decision either way; and therefore that the claim ought not now to be allowed. That the credit for the twenty half joes paid Walch, by order of the appellee in August 1781, ought not to stand, as in the decree, to be repaid now in specie, with interest; but ought to be applied at its relative value, at the time, towards the discharge of the paper debt. Specie, at that period, not being considered, as a circulating medium, but a commodity at market, the value of which was to be settled by contract, or if none such, by the current value at that time, independent of the legal scale; nor, in the present case, has the contract for tobacco, another commodity, any influence on the question. The Master, residing at Petersburg, is presumed to have been well acquainted with the value, and in his first report to have stated the credit accordingly (having departed from the legal scale and the contracts for tobacco;) and therefore that it ought to stand as there stated in paper; and that the other articles of debit and credit ought to stand as stated in the last account. That the demand being for an account unliquidated, in which there were considerable articles in dispute, so that it was uncertain on which side the balance would be, no interest ought to be allowed on the balance. The decree therefore is to be reversed; and the cause remanded to the High Court of Chancery, for that court to have the account between the parties reformed and a decree entered according to the principles of this opinion, reserving to the appellee liberty to make a future claim, for the outstanding debts.

or

r any of them, on proper proof of the receipt hereof by the appellants, or of gross negligence on their part in the collection; and as to the coffee upon proper proof to charge them.

M'Connico  
vs.  
Curran.

CASES

APRIL TERM  
CASES  
ARGUED AND DETERMINED  
IN THE  
COURT of APPEALS  
IN  
OCTOBER TERM OF THE YEAR 1800.

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GLASSEL

*against*

DELIMA.

*Article 213.*

On a joint notice to all the obligors in a forthcoming bond, the plaintiff may take judgment against one of the defendants.

GLASSEL gave a forthcoming bond, with James Somerville and David Blair securities, to Delima. Upon this forthcoming bond, Delima gave notice to Glassel, Blair and the executors of Somerville jointly, that he should move the District Court for judgment. He took judgment, however, against Glassel only. The defendant filed a bill of exceptions, reciting the notice and execution, with the sheriff's return, in *verba*; and stating, that the defendants excepted to the same as improper, but that the District Court overruled the exception.

Glassel appealed to this Court.

WICKHAM for the appellant. The question is, was the notice sufficient for the Court to give judgment against the appellant only? A notice should be at least as particular as a declaration; and upon a joint declaration the plaintiff could not cease to prosecute the suit against some of the defendants, and take judgment against the rest. This is a fault which the statute of Jeoffairs

would

would not cure, and much less will that statute cure the error on a motion; to which the statute does not apply.

WARDEN for the appellee. Was stopped by the Court; who held clearly that the notice was sufficient to warrant the judgment.

Judgment Affirmed.

## STANNARD

*against*

GRAVES & *al.* ex'rs. of BLAYDES.

THIS was an appeal from a decree of the High Court of Chancery, where Stannard brought a bill, against Graves and others executors of Blaydes, to be relieved touching judgments upon two bonds given by him to Blaydes, for some carpenters work done by the latter. After answer, replication, and commissions to take depositions, the cause was heard upon the bill, answer, exhibits, and the depositions, which were very numerous. When the Court of Chancery dissolved the injunction as to part of one of the bonds, and directed, "issues to be made up between the parties to enquire whether the dispute between the plaintiff and the testator concerning breaches of the articles of agreement entered into by them, and referred to in the bill was adjusted at the time when the plaintiff executed the two bonds, on which the judgments were obtained; and, if not, to enquire, whether the testator was guilty of a breach of those articles, and to assess damages for such breach; and also to enquire whether any agreement was made between the plaintiff and the said testator at the time of executing those bonds, or before, other than

"the

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Glassel  
*vs*  
Delima.

After three verdicts the Ct of Chancery, did right in decreeing according to the opinions of the juries.

If the judge who tried the cause is satisfied with the verdict it ought to be certified or a bill of exceptions taken; else the omission cannot be supplied by affidavits especially of the counsel, for it would be a most dangerous precedent.

The discretion of the Chancellor is to be exercised on sound principles, of which this Court may judge.



Stannard  
vs.  
Blaydes.

“the first, that the latter should perform other  
“work for the former, and whether, such work  
“was performed accordingly, and, if not, to as-  
“sess the damages sustained, by the breach of  
“that agreement.” The jury found, “That the  
“dispute between the plaintiff and the testator of  
“the defendants concerning breaches of the arti-  
“cles of agreement, entered into between them  
“and referred to in the first issue, was adjusted at  
“the time when the plaintiff executed the two  
“bonds, on which the judgments were obtained.  
“And that an agreement was made between the  
“plaintiff and the testator of the defendants, be-  
“fore the time of executing the two bonds men-  
“tioned that the said testator should perform  
“other work for the plaintiff, and that the second  
“agreement was adjusted in the amount of the two  
“bonds aforesaid when executed.”

Upon the verdicts being certified into the Court  
of Chancery, that Court, for reasons appearing,  
set aside the verdict and ordered a new trial of  
the second issue. And, “setting aside so much of  
“the several orders as is inconsistent with what fol-  
“loweth,” directed a jury to be impanelled be-  
“tween the parties to enquire, “Whether the  
“testator of the defendants, at the time of the ex-  
“ecution of the bonds, on which were rendered  
“the judgments sought to be enjoined, did agree to  
“make good any defects in the building of the plain-  
“tiffs dwelling house mentioned in the first agree-  
“ment between the said testator and the plaintiff:  
“And whether such defects were made good ac-  
“cordingly, and if not, to ascertain the damages  
“occasioned by breach of that agreement: To  
“enquire whether the said testator did perform  
“the work, which he had agreed to perform over  
“and above the building of the dwelling house in  
“a faithful and workmanlike manner; and, if not  
“to enquire what damages the plaintiff sustained,  
“by non performance of that work and infidelity  
“of the builder; and lastly to enquire, whether  
“the damages sustained by the plaintiff, for either  
“or

"or both of those breaches, were satisfied, allowed, accounted for, or otherwise adjusted between him and the said testator, at the time of executing the forementioned bonds."

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Upon these last issues, the jury found, "That the testator of the defendants did not agree, at the time of the execution of the bonds, to make good any defects in the building of the plaintiffs dwelling house; That he did not perform all the work which he had agreed to perform, over and above the dwelling house: But that there was a complete settlement between the plaintiff and the testator of the defendants, at the time of the execution of the bonds, and that no allowance was made by the plaintiff to the testator of the defendants at the time of executing the said bonds for any work, which was not done."

Upon this last verdict being certified into the Chancery, the plaintiff moved that the verdict might be set aside, upon two affidavits which he filed; but the motion was rejected, by that Court, which decreed, "if the money for which the injunction was dissolved had been paid that the injunction as to so much should be perpetual, but for the whole of that money, or the part thereof, yet unpaid, the judgment, which was to be discharged by payment of £ 179, do remain as a security, and the bill was to be dismissed as to the other judgment."

From which decree Stannard appealed to this Court.

One of the affidavits, referred to in the decree, stated, that the witnesses after the last verdict moved the District Court to certify that it was contrary to evidence; and that one of the judges, (Mr. White,) after they had considered the motion said it was unnecessary, as it would appear from the account stated between the parties, which could be sent to the Chancery Court, that the verdict was against evidence.

The

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The other affidavit stated, That after the last verdict, one of the jurors, in a conversation with the witness, mentioned, that, as the said Stannard had given his bonds to Blaydes, if all the proof in the world had been given in the said Stannard's favor he would have given judgment against him, and that the rest of the jury were led to give judgment from the same principle.

NICHOLAS, WARDEN and WICKHAM for the appellants, contended, that the evidence contained in the record was clear; and therefore the Chancellor ought to have decided on it himself. Consequently, that he either ought to have directed no issue at all, (*Soutball vs M'Keand* from the order book,) or if any, that it ought only to have been an issue to ascertain the damages. That one of the judges who tried the cause, thought the verdict, wrong, and when asked, for a certificate to that effect declined it, saying that the account would shew it.

RANDOLPH for the appellee, contended, that the whole was a question of fact; and therefore proper for the determination of a jury. 2. *Conn.* 316, 626. Consequently that the issues were properly directed; and, after three verdicts, that the question ought to be at rest. That there was no certificate, or other record, of the opinion of the judge; and no other evidence, of it, was admissible. Besides, the reason ascribed to him, for the opinion which he was said to have expressed, was not sufficient.

PENDLETON President, delivered the resolution of the court as follows.

The first question made was, whether the Chancellor erred, in directing an issue to be tried in this case at all; or, at least, other than to ascertain the damages?

The appellants counsel were correct in stating that the discretion of the Chancellor, upon this and all other occasions, is to be exercised, by him, upon

upon sound principles of reason and justice; and that this as an appellate court, has a right to judge, whether he has so exercised his discretion, in the present case? But they are unlucky in the application.

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The observation urged that the evidence was so plain, the Chancellor ought to have been satisfied, might have been repelled by the event, since two verdicts had been given against this plain evidence. But how did it then appear?

The points in dispute had been submitted to a jury, in a suit on the bond: Whether properly or improperly is immaterial: Most of the same witnesses were examined; particularly those of the appellant, Long and Thorp, the most material; and a verdict passed against the claim. Three jurymen had sworn they gave little credit to their testimony, for reasons which they were the judges of; no matter what. Was the Chancellor to shut his eyes to this strong bar against the claim, and say with the counsel, the evidence was plain, and the credibility of those witnesses not in question? Strange supposition.

He might probably have been justified in dismissing the bill, as the subject had passed a jury; but considering, that the jury might have been embarrassed by the bond, he more wisely directed an issue, framing it so as to avoid that embarrassment.

A verdict is again found against this plain evidence, as it is called; and the appellant was indulged with a third jury, who still find an according verdict: And why should not the Chancellor be satisfied at last?

Perry speaks of a conversation with a jurymen, intimating that he decided upon improper principles; a conversation probably mistaken, or garbled; and not to be regarded, on any view of propriety.

Mr.

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Mr. Brooke moved for a certificate, that the verdict was against evidence: Mr. White, the junior judge, said, it was unnecessary; for the account would shew it, and Mr. Brooke acquiesces: The other judge was silent, and might not think it against evidence.

The certificate must appear of record, from the court; or upon a bill of exceptions, if refused, and is not to be supplied by affidavits; especially of lawyers; a most dangerous precedent.

Where is the account, which justifies Mr. White's opinion? The private accounts of the parties, in the record, prove nothing, not being authenticated themselves, but mere *ex parte* statements.

The verdict stands unimpeached; was the third upon the subject; and all of them agreeing. It was therefore high time the matter should be put at peace. This is done by the decree; which is affirmed.

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## C O O K E

*against*

## S I M M S.

The first judgment of the Court of Appeals in this cause, was as follows:

Ante 39,  
O&R. 27-796

“ **T** HIS day came the parties by their counsel, and the transcript of the record; of the judgments aforesaid, having been maturely considered the Court is of opinion, that the judgment of the said District Court is erroneous. Therefore it is considered that the same be reversed and annulled, and that the appellant recover against the appellee his costs by him expended in  
“ the

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Simms

“ the prosecution of his appeal aforesaid here, and  
 “ this Court proceeding to give such judgment as  
 “ the said District Court ought to have given, be-  
 “ ing of opinion that there is no error in the  
 “ judgment of the said Court of Hustings upon the  
 “ demurrer joined, nor in the writ of enquiry ex-  
 “ ecuted thereupon, but that there is error in the  
 “ final judgment of the Court of Hustings aforesaid  
 “ in this, that the appellee had not previously en-  
 “ tered, *nolle prosequi*’s upon the three last counts  
 “ in his declaration, and had not after the judg-  
 “ ment entered a *nolle prosequi* as to the issue on  
 “ the first count, It is further considered that  
 “ the final judgment of the Court of Hustings afore-  
 “ said be also reversed and annulled, and that the  
 “ appellant recover against the appellee his costs  
 “ by him expended in the prosecution of his appeal  
 “ in the said District Court, and it is ordered that  
 “ the cause be remanded to the Court of Hustings  
 “ aforesaid for further proceedings to be had  
 “ therein, from the execution of the writ of en-  
 “ quiry.”

The order for setting aside the judgment was as follows: “ On the motion of the appellant, by his counsel, and for reasons appearing to the Court, It is ordered that the judgment rendered in this cause the twenty seventh day of October last be set aside, and that the cause be continued till the next Court, and be then reheard.”

Novr. 3. 1796

✍ It was thought, that printing the above, would make the former statement, in page 42, more perfect.

WHITE

## WHITE

against

ATKINSON.

The Court of Chancery cannot make any alteration in the terms of a decree of this Court certified thither in order that a final decree may be made in the cause.

SEE the statement and decree in this case, in 2. Wash. 94 to 106. Upon the cause going back, in pursuance of the decree of this court, to the Court of Chancery; *That* court, after the issue directed, had been tried, made the following decree.

“ By the verdict certified to have been found upon trial of the issue, between the plaintiff and the defendant Roger Atkinson, directed by the decree of the fourteenth day of March, in the year 1796, the 487 acres of land, mentioned in the said decree, appearing to have been worth seven shillings and six pence by the acre, on the last day of September 1779, the court this 13th of September 1797, doth adjudge, order and decree, that the plaintiff do pay unto the defendant Roger Atkinson £ 167:12:6, being, *with the eighteen pounds paid by the plaintiff*, the value of the land aforesaid, with interest thereupon to be computed, after the rate of five *per centum per annum*, from the said last day of December 1779, and that upon such payment, the defendant Roger Atkinson do seal and deliver, to the plaintiff, a sufficient conveyance of the said land, with a covenant for general warranty of the title: The Court of Appeals when they declared this court to have erred in decreeing to the defendant Roger Atkinson the value of the money at the time appointed for payment thereof, instead of the value of the land, at the time of contract, and in not allowing to the plaintiff the option of abandoning his claim, and losing the eighteen pounds, which he had paid, and the value of improvements, which he might have made, and when they corrected the decree in both instances, but in the former only, in case either

either party should choose at his own expence, another trial to ascertain the value of the land are supposed not to have intended, that the plaintiff in case of abandonment, should make no satisfaction for occupation of the land in the mean time: And therefore this court doth farther adjudge, order and decree, that the plaintiff, if he will not accept the conveyance aforesaid, do resign to the defendant Roger Atkinson possession of the land aforesaid on the last day of December in the present year; and for occupation of the land aforesaid, pay that defendant the annual interest upon the said £ 164 12: 6, to be computed from the said last day of December 1779; and that the plaintiff do pay unto that defendant the further costs expended by him &c." From which decree White appealed to this court.

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**RANDOLPH** for the appellant. The Court of Chancery could not decree an account of the profits, as this court had made no provision for them. Because that court can only execute the decrees of this according to the letter; and cannot extend them, on a presumption that this court would have provided for the additional relief, if the supposed necessity of it had been foreseen. Perhaps a bill of review might lie; but it was clearly out of the power of the Court of Chancery, as the proceedings stood, to afford any other relief, than the decree of this court had prescribed.

**CALL** *contra*. Although the Court of Chancery cannot decree against the directions of this court, yet it may decree consistently with them.

In the present case no direction was given, as to the profits; and therefore the Court of Chancery might provide for them, in consequence of the new circumstance of the abandonment having occurred. The Court of Chancery is to decree according to the principles of the decree here; which necessarily supposes, that it is to have power to

provide



White  
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provide for the unforeseen contingencies which may take place, during the details of the business. If a bill of review would have lain for that purpose, it is decisive; because, whilst the cause was still unfinished and the parties in court, the Chancellor might proceed to do effectual justice, without the formality of a bill of review; the only object of which is, to apprise the court of the new facts.

**RANDOLPH.** The difference would have been, that on a bill of review, White might have rebutted with new matter.

**CALL.** That would not be material in a case like this; because the parties would have to go before a master, who would report the special matter.

*Per Cur;* The Court is of opinion, that if the provision in the said decree, in the case of abandonment, had been proper, it ought to have gone further, and allowed the appellant the eighteen pounds, paid by him, and satisfaction for stable improvements also; but that the said High Court of Chancery was precluded, by the former decree of this court from changing the terms of abandonment. Therefore, so much of the decree, as makes such change is to be reversed with costs; and the residue affirmed.

## K E R R

against

## D I X O N.

**K**ERR brought trespass *quare clausum fregit* against Dixon, in the District Court. Upon the defendants coming in to set aside the office judgment, the entry on the record is as follows: "This day came the plaintiff by his attorney, and the defendant also by his attorney, who plead *justification*, to which the plaintiffs attorney replied generally. Therefore &c." in the usual form, without any further pleadings on either side. Upon the trial of the cause the plaintiff filed a bill of exceptions to the Courts opinion; which stated, "that the defendant introduced William Robinson, as a witness to prove, that a large white oak, on the plat filed in this cause, standing in the line at the place marked on said plat No. 1. was a corner of Beverley Manor; and, if the said corner would stand at No. 7, on said plat, where the plaintiff insisted, the corner stood, that then, the witness, stated that he would lose some of the land, which he the said witness then held, and would hold, if the corner was established at No. 7; to which evidence the plaintiff objected, as being interested; which objection was overruled, and the said evidence was suffered to go to the jury, to judge of its credibility, as this verdict could not be evidence in a suit by, or against the witness." Verdict and judgment for the defendant. Whereupon, the plaintiff appealed to this Court.

In trespass, if the defendants pleads, the word *justification*, only, and the plaintiff replies generally, no issue is joined, in the cause; and therefore, after verdict for the defendant, a repleader will be awarded.

*Quere.* If, in a suit between K and D concerning lands, R, who is interested, in having a corner tree fixed at a certain point, claimed as the corner point by one of the parties, be a competent witness, or not?

CALL for the appellant. Made two points. 1. That there was no issue in the cause, as the plea contained no fact, upon which an issue could be joined. 2. That the witness was clearly interested.

NICHOLAS

Kerr  
vs  
Dixon.

**NICHOLAS contra.** The plea amounts to the general issue of not guilty. It is a mere misjoinder of issue; and therefore cured by the statute of Jeoffails. For the plaintiff ought to have demurred; and having omitted it, he shall not be received to take advantage of his own fault. The witness was not interested; because the verdict could not be given in evidence, in a suit against him.

**CALL** in reply. If the plea means any thing, it is that the defendant was justifiable in what he did, and therefore, instead of amounting to the general issue of not guilty, it rather admits the fact, but supposes an excuse for it, of some kind or other. However, the very doubt shews the impropriety of the proceeding. For if the parties themselves cannot interpret its meaning, much less could the jury, whose minds ought to be drawn to the consideration of a definite point, and not to be embarrassed and entangled with all the varieties, which the ingenuity of parties might suggest upon the evidence, at the trial. It was not a mere misjoinder of issue; which never happens but where a material fact is stated in the plea, but the issue is informally made up, upon the fact. In this case, however, no fact is stated in the plea, upon which an issue formal, or informal, could be joined; but all is conjecture and uncertainty. It is not necessary, in order to disqualify a witness on account of interest, that the verdict should be capable of being given in evidence, in a suit against him. It is sufficient, if his interest appears to the court; and here it did in a remarkable degree. Inasmuch as the establishing a general corner tree, would be fixing a land mark, by which the neighbourhood would be regulated in future; and from which, impressions would be drawn, in every subsequent trial. For, although, the verdict could not be offered in evidence between other parties, yet it would fix a reputation in the neighbourhood, which would have an influence on the minds of the jurors; who would be told of it, in spite of all the pains, to the contrary, which could be taken.

*Cur. adv. vult:*

**ROANE**

**ROANE Judge.** After stating the case, proceeded as follows:

The first question which occurs in this case is, whether the plea is good in itself? And, if not, then, secondly, whether it is cured by the verdict, under the statute of amendment and jeoffails?

As to the first question, the general issue, in trespass, is not guilty: Which denies the trespass, stated in the declaration; and impresses on the plaintiff the necessity of proving it; at the same time that it gives him an opportunity of knowing to what point to apply his evidence. On the contrary a plea of justification admits the taking, but sets up a new ground shewing it to be justifiable.

On general principles it is as necessary, that the plaintiff should be informed, by the plea, of the particular justification set up, in order that he may know how to rebut it, as it is that the defendant should be informed, by the declaration, of the particular trespass alledged, in order that he may deny, or justify it. The principal end of pleading is frustrated, whensoever the one, or the other, is so general as not to shew the adverse party, the particular ground which is relied on.

These general principles are fully supported by authority. For the books uniformly prove, that, a defendant has a special justification, he must plead it. 2. *Esp.* 102. Nor do I recollect, to have, any where, seen, a plea of justification like the present.

The question then is, how does this illegal plea stand, upon the statute of jeoffails? The words of the act are indeed very large, as a verdict; under it, goes to cure mispleading, insufficient pleading, discontinuance, misjoining of issue &c.

But even upon the text of the statute itself, these extensive words, *mispleading* and *insufficient*, might, perhaps, be deemed to be restrained to defects, which do not go to the gist of the action or plea,

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vs.  
Dixon.

plea, by being coupled with discontinuance, mis-joining of issue, lack of warrant of attorney &c, which are mere secondary and inferior defects, and, wisely, not permitted to prevail after verdict.

This, however, is on the mere text of the act; but on the reason and design of it, shall a construction be given, which will frustrate the end of all pleadings, and authorize a judgment, when it does not appear to the court, that a judgment ought to be rendered?

It has often been decided here, that a verdict did not cure a declaration, which omitted to set out the gist of the action. The same principle will extend to the case of a plea, which does not set out the gist of the defence. In both cases a degree of particularity and certainty is necessary, not only, that the adverse party may know precisely what to answer (the end and object of special pleading,) but that the court may not pass judgment in a case, which does not appear to them, to warrant it: And that, they may not, as for example; in the case before us, discharge a defendant, on a plea of justification, unless, there appears a good justification, in point of law.

These principles have had the sanction of this court, in the cases of *Winston vs Francisco*; \* *Chichester vs Vass* † and *Baird vs Mattox*. ‡ To the course of reasoning, in which cases, I beg leave to refer, by way of explaining the ground of my present opinion, and to save time.

The Court therefore ought to have awarded a repleader, the plea in question being so substantially defective, that a final judgment, thereupon, ought not to have been given, for the defendant.

But

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\* 2. Washington's Rep. 187.

† 1. Call's rep. 83.

‡ Ibid. 257.

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But another point was made, by the plaintiff, and determined against him, as appears by the bill of exceptions, relative to the competency of a witness. Which point is necessary to be now decided, since if the Court erred therein, a direction should be given to reject the witness, on a future trial.

It is necessary to consider in what sense the word "established" is used in the bill of exceptions, as relative to the corner tree in question. If the effect, of the witness's testimony would be, so to *establish* it as to shut up the point, in all future inquiries, on the subject; so to *establish* it, as that the verdict could hereafter be given in evidence, in favor of the witness, or his representatives, then clearly, he was an interested witness and ought to have been rejected; but if the word only purported an *establishment* of this fact, as between the then parties and in that suit, then I think, a contrary conclusion will follow.

The *last* is the only sense in which the word could be understood, without infringing the plainest principles of law. And we must suppose the witness so understood it, as the contrary does not appear. If it did, I will not say, how far his testimony might be impeached, in consequence of his thinking himself really interested, when in fact he was not.

That the word must be understood in the *last* sense seems clearly to follow from these considerations. *That* a verdict can never be given in evidence, but between those who are parties, or privies, to it. *Bull* 233. If the present witness should ever have a controversy, concerning his land, involving the line tree in question, it would most probably not be with the plaintiff, or his representatives. It is not stated, that in that case, the controversy would be with them; and we cannot infer it. If so, the opposite party, in that fu-

ture

*Bent  
vs  
Dixon.*

ture action, would, be an utter stranger to the fact, put in question, on the former trial. It would, in the language of *Buller*, be, as to him, *res nova*; and he would be bound by a decision, which neither he, nor those under whom he claims, had the liberty to controvert; than which, says the same writer; nothing can be more contrary to natural justice.

I assume it then, as a clear and incontrovertible position, that this verdict could never be used in favor of the witness, especially, in a contest with those, who are strangers to the present plaintiff. And if so, how does the case stand with reference to the most approved decisions? In questions, concerning the bounds of evidences there is a considerable degree of contrariety and contradiction. I have examined many cases ancient and modern, and I infer, that the modern doctrines entirely sustain my present opinion; and that few, if any, of the ancient cases conflict with it, when we go into the reasons, on which, such decisions are founded.

The case of *Bent vs Baker* 1 *Term Rep.* 27. is very full, and the most modern, which I have seen, upon the subject; and I entirely concur with the opinion of the judges therein; especially, those of Lord Kenyon and Mr. Justice Buller. The former Judge has fortified his opinion, with the high authority of Lord Mansfield and Lord Hardwicke, in the several cases of *Walton vs Shelley*, and *The King vs Bray*; particularly referring those, to whom my opinion is addressed, to the case of *Bent vs Baker* throughout, I beg to select such passages and doctrines, therefrom, as are decisive, with me, in the present case; without, now, specifying, individually, from which of those eminent judges the doctrines have fallen. I omit this, as being unnecessary, and for the sake of brevity. It is there stated, *That* many of the old cases, on the subject of competency, have gone on very subtle grounds; but that, of late years, the

Courts

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Courts have endeavoured to let the objection go to the credit, rather than to the competency; *That* whenever there are no positive rules of law, to the contrary, it is better to receive the evidence, making, nevertheless, such observations, on the credit of the party, as his situation requires. *That* respect, on this subject, is to be paid to the question put on a *Voir dire*; namely, whether he is really interested, in the event of the cause? which question involves all particular questions, "of how interested? &c." and amounts to this, whether the record in that cause will affect his interest? *That* upon the ground of such record being admissible, only, has the case of commoners turned; they being incompetent witnesses, when such record can be used, but otherwise not. *That* where the proceedings in the cause cannot be used for the witness, he is competent whatever wishes he may entertain on the subject; which however may properly go to his credit. *That* on general grounds, in the case of under writers (which is very similar to this) there is no objection to one of them being examined for another, who has subscribed the same policy, notwithstanding a former case *Ridout vs Johnston*, which may have been determined on its own particular circumstances. *That* the true line is taken to be, whether the witness is to gain or lose, by the event of the cause? Which depends on the question (if the witness is not directly interested in that very cause,) whether the verdict could be used for, or against him, in a future suit? And Judge Grose says, in the same case, that it is better to narrow the objection to those cases, in which the witness is interested in the event of the cause, unless in those exceptions which have been established by solemn decisions.

Fortified by such reasoning and such authorities, which entirely accord with my own inferences from the just theory of evidence, I need not enter into a particular analysis of some old cases, which may, on a slight view, appear to conflict with my present opinion. I am free to declare,

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however,



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however, that, on an attentive consideration of many of them, there are very few, if any, which do not appear clearly distinguishable from the present case; and particularly in that point, which respects the admissibility of the verdict on a future trial.

There is one possible point of view, occurring to me, in which the witness, in question, or his representatives, might be benefited by the testimony given, in the present cause: Which is this, that in questions concerning boundaries, at a great distance of time, traditionary evidence might, perhaps, be allowed concerning line trees; and this tradition might, possibly, in part, have arisen from the verdict found, on the testimony of a person, who, or whose representatives, may be parties to the future suit. This I admit is a possible case, but it is so remote, contingent, and uncertain, as not to form an exception, from the doctrine just stated.

In *Bull. n. pr.* 284, it is laid down, "that an interest is said to be, where there is a certain benefit attending the determination of the cause one way;" and again "that it must be a present interest, for a future and contingent interest will not prevent a person from being a witness."

These passages seem fully to justify my conclusion, as to the witness in question; and I think the District Court did right, in permitting him to be sworn in the cause.

In *Meade vs Tate* \* in this Court, the judgment of the District Court was reversed, and that of the County Court, admitting the competency of a witness similarly situated, was affirmed; and upon the whole, I am of opinion, that the witness, in the present case, was competent; but that a repleader should be awarded, on account of the defective pleadings.

FLEMING

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\* Ante 125.

**FLEMING Judge.** The pleadings in this case are, clearly, too loose and indefinite. For the plea of the defendant only consists of the word *justification*; and to this, the plaintiff replies generally: Upon which, the parties went to trial, without any particular fact being alledged, on either side, on which an issue could be joined. Of course, I am warranted, in saying, that there was no issue joined; and therefore, that the judgment, upon that ground, ought to be reversed, and a repleader awarded.

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I was at first inclined to think, that the objection to the witness went to his credit, and not to his competency; but, upon reflecting on his own declarations and his situation with respect to the controversy before the court, I am decidedly of opinion that he ought not to have been admitted. The reason why an interested witness is not admissible is, that there is a presumption, that his interest would produce an improper bias on his mind; and therefore, the law rejects him altogether. The slightest interest is sufficient for this purpose. Hence one commoner cannot be a witness to prove a right, in an action brought by another. For the right being entire, he comes to support his own title. So where lands lay in two parishes, the parson of one was not received as a witness; because he might enlarge his own parish, and consequently the tythes. 2. *Bac. ab.* 590. 7. *Mcd.* 63. Again a person, who had acted in breach of an alledged custom, was not held a competent witness, to disprove the existence of the custom, because, if the custom should not be established, he would be discharged from an action, on account of the breach. *Doughl.* 359. The principle of which cases seems, to me, to apply, expressly, to that under consideration. For in neither of them was the interest of the witness more immediate, than in the present case. He was only to be eventually affected; and that was the case here. The question was, whether No. 1, or No. 7, in the survey, was the true corner of Beverley Manor;

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Manor; and the witness appears to have been materially interested, in that question. For, by his own confession, if No. 1. is the true corner, he saves part of his land; but otherwise, if No. 7. be the corner. In this situation the presumption of bias is so strong, that it is sufficient, in my opinion, to repel him; especially, as his testimony went to prove, that No. 1. was the true corner; the very fact, which he was interested in having established. I think therefore, that he was incompetent, and ought to have been rejected.

CARRINGTON Judge. There can be no doubt, but that there must be a replender. For the plea is unquestionably bad, and not cured by the statute; which was never meant to be extended to a case like this, where there is nothing certain or issuable in the pleadings.

But as to the point relative to the admissibility of the witness, I am equally clear, that he ought to have been received. For his interest cannot be affected, by this suit; inasmuch as the verdict and judgment in this case cannot be given in evidence, for, or against him, in a future action. I am therefore of opinion, that he was admissible; and that the objection was matter of observation only; which went to his credit, and not to his competency.

LYONS Judge. We all concur, in opinion, that the plea is bad, and that a replender must be awarded.

But I differ with those who think, that it was right to receive the witness. For he and the defendant claim the same boundaries; and both are interested, in establishing the corner tree, at No. 1. That no man can be a witness in his own cause is a rule of universal justice; and it is also laid down that no person interested in the question, before a court, can be a witness. Nay more, if a witness only apprehends himself to be interested, although, in fact, he be not, yet he is not admissible.

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ble. 1. *Stra.* 129. Now here the defendant and the witness both claiming the same corner, they have equal interest in establishing the same fact. Therefore although the witness is not subject to the costs and damages in that suit, yet his title and boundaries are drawn into question; and the verdict and judgment, in this case, will, as Lord Holt observes in *Salk.* 283, be sure to be heard of, and may have an influence, on the jury, in any suit, which may be brought against him. I am therefore of opinion, that he was not a competent witness, but, as the court are divided upon this point, no direction, with regard to it, can be given. The judgment however, is to be reversed for want of an issue, and a repleader awarded,

Judgment reversed and a repleader awarded.

M A Y O

against

C L A R K.

**T**HIS was a *supersedeas* to an order of the District Court denying a *supersedeas* to an order of the County Court concerning a road.

PENDLETON President. Delivered the resolution of the Court to the following effect.

The Court is satisfied that they cannot go into the merits of the case until the District Court has decided on them. But they are equally clear that there are sufficient grounds upon the record, for the District Court to award a writ of *supersedeas* to the order of the County Court. The order of the District Court therefore is to be reversed, and a writ of *supersedeas* awarded from that Court; who are to proceed thereupon as in the usual cases of writs of *supersedeas* to orders of this kind.

BROWNE

The Court of Appeals has no original jurisdiction; and cannot decide the merits of any case until they are decided on by the District Court

Construction of the 7th section of the act of descents.

W. of full age, died intestate, without issue and unmarried; seized and possessed of an estate partly derived, by devise, from his father G. W. and partly by descent from his brother R. W. leaving an uncle and three cousins, children of a deceased uncle of the whole blood on the mothers side, and an uncle of the half blood likewise on the mothers side, and leaving, also, two relations on the fathers side. The estates were ordered to be divided into two moieties: of which, one was to be divided between the two relations on the

**T**HIS was an appeal from a decree of the High Court of Chancery, where John Turberville Gowen C. Turberville, Richard C. L. Turberville, Hannah L. Turberville and George Fitzhugh, brought a bill against Browne and wife and Morton and wife, stating, That, in 1796, George Waugh, of full age, died intestate, without issue, and unmarried. That he was seized and possessed of a considerable real and personal estate, part thereof derived to him, by devise, from his father Gowry Waugh, who died in the year 17—; and the residue, by descent, from his brother Robert Waugh, who died unmarried, and without issue in 1795. That the plaintiffs are the next of kin, on the part of his mother to the said George Waugh; that is to say, the plaintiff John Turberville and George Turberville deceased, (the father of the plaintiffs, Gowin, Richard and Hannah Turberville) were the uncles of the whole blood to the said George Waugh on the mothers side, and the plaintiff George Fitzhugh was half brother to the mother of the said intestate. That the wife of the defendant John Browne, and Hannah wife of George Morton are next of kin to the said George Waugh on his fathers side. That the plaintiff John Turberville and the said John Browne have taken administration upon George Waugh's estate. That the plaintiffs have applied to the said John Browne and George Morton and their wives for a division of the property of George Waugh, but, as

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fathers side, and the other moiety was to be allotted those on the mothers side as follows, to wit, two fifths to the uncle of the whole blood; two fifths to the three cousins; and one fifth to the uncle of the half blood.

as the plaintiffs and defendants differ in opinion as to the portions to be allotted, nothing has been done. The bill therefore prays for a division according to law, and for general relief.

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The answer of Browne and wife admits the acts stated in the bill; except, that they know not, in what manner Robert Waugh's supposed share of his father Gowry Waugh's estate, is to be traced and derived from the said Gowry Waugh, but reserving to themselves, a future right to investigate that point, they, at present, admit the act as to Robert Waugh's estate, as stated in the bill.

The Court of Chancery was of opinion, "That the statute passed in the year 1792, *directing the course of descents*, ought to be understood in the following sense. First When any person, having title to any real estate of inheritance, shall die intestate, as to such estate, it shall descend and pass, in parcenary, to his kindred male and female, in the following course, that is to say; second to his children, or their descendants, if any there be, third and sixth, if there be no children, nor their descendants, then to his father, unless the intestate, who had derived the estate by purchase, had descent from his mother, die an infant, without issue, in which case, the father or his issue, or any other woman, than the mother, shall not succeed, if any brother or sister of the infant, on the part of the mother, or any brother or sister of the mother or any lineal descendant of either of them be living: Fourth and fifth, if there be no father, then to his mother, brothers and sisters, and their descendants, or such of them as there be; unless the intestate, who had derived the estate, by purchase or descent, from his father, die an infant, without issue, in which case the mother, or her issue, or any other man than the father, shall not succeed with the intestate's brothers and sisters, if any brother or sister of the infant, on the part of the father, or any brother or sister of the father, or any

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lineal descendant of either of them be living: Seventh, if there be no mother, nor brother, nor sister, nor their descendants, then the inheritance shall be divided into two moieties (unless the intestate, who had derived the inheritance, either by purchase or descent, from either the father or the mother, die an infant, in which cases, the paternal kindred shall not participate of the estate, derived from the mother, and *vice versa*, the maternal kindred shall not participate of the estate derived from the father, by the fifth and sixth sections preceding) one of which moieties shall go to the paternal the other to the maternal kindred, in the following course, that is to say: Eighth, first to the grandfather: Ninth, if there be no grandfather, then to the grandmother, uncles and aunts, on the same side, or such of them as there be: Tenth if there be no grandmother uncle nor aunt nor their descendants, then, to the great grandfathers, or great grandfather, if there be but one, and so on making the fifth and sixth sections, and that part of the seventh section, relative to the parent, from whom the estate had been derived, to an infant dying intestate, independent of all the subsequent, sections until the fourteenth. Fourteenth and where for want of issue of the intestate, and of father, mother, brothers and sisters, and their descendants, the inheritance is before directed to go by moieties, to the paternal and maternal kindred on the one part, or, if the kindred, on the one part, shall be excluded from succession, by the fifth and sixth sections preceding, the whole shall go to the other part: That by the statute interpreted in the sense, which this paraphrase thereof exhibiteth and by the twenty seventh section of the statute passed in the same year concerning wills and the distribution of intestates estates, all the estate of George Waugh, who was of full age, had no issue, and was not married, at the time of his death, derived to him, as well, from his father Gowry Waugh, as from his brother Robert Waugh, must be divided into

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two moieties, to one of which his paternal, and to the other his maternal kindred will succeed; that the only plausible objection to this interpretation is, that these words, in the seventh section, *and the estate shall not have been derived, either by purchase or descent from either the father or the mother*, are taken out of their place, and expounded in a sense, not agreeing exactly, if agreeing, at all, with their true meaning, and these words in the interpretation, '*or if the kindred on the one part, shall be excluded from succession, by the fifth and sixth sections preceding*,' are arbitrarily supplied in the fourteenth section of the statute directing the course of descents; that in answer to this objection, the transposition and exposition of those words in the seventh, and the supplement of those in the fourteenth section, may be justified, by these considerations, first, the Legislature, forming the general system of succession to real estates of inheritance, manifestly supposed the canons ordained for regulating it, to be dictated by the natural affection, which would have moved the owner, in disposing his estate, whether of original or derivative acquisition, if he had appointed testamentary successors, in case he had no children, to appoint his kindred on both sides, but the Legislature, in a single instance only, which was the case of an infant, who deriving an estate from father or mother, died, without issue, and unmarried, thought proper, for some cause or other, to interrupt and divert the succession: and the interpretation proposed in the paraphrase, will confine the operation of the fifth, sixth and seventh sections to that instance, and renders the supplement, to the fourteenth section, a necessary consequence, leaving the operation of the other parts of the statute undisturbed, in every other instance. Second, the words transposed, otherwise expounded, will not only be inconsistent with the supposition and design of the Legislature, but will derange the whole system, that the greater part

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of it, will be, if not unintelligible, ineffectual, in numberless instances, for the seventh section, unconnected with the two, which immediately precede it may, without violating any rule of sound criticism, be connected with all the subsequent parts of the statute, and influence them in such a manner that they will not operate, in any other case but that in which the intestate derived the inheritance from one, who was not his father, or mother." That court therefore appointed commissioners to divide the estates into two moieties; "And allot one half of one of the said moieties to the defendants George Morton and Hannah his wife, and the other half of that moiety, to the defendants John Browne \* and his wife, and to divide the other moiety into five equal parts, and allot of those five parts, two to the plaintiff John Turberville, two others to the plaintiffs Gavin Turberville, Richard C. L. Turberville and Hannah L. Turberville, and the remaining part to the plaintiff George Fitzhugh." From which decree, Browne and his wife appealed to this Court.

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RANDOLPH for the appellants. After stating, that the whole depended on the construction of the 7th section of the act of 1792, Contended that the Chancellors exposition of the statute could not be supported. For the Court cannot substitute words merely because the Legislature have not made any provision for the case. Indeed from the various alterations which the law had undergone since the act of 1785, it was fair to infer a change in the Legislative will upon the subject. So that the Court would rather view it, as a *casus omissus*, and resort to the principles of the common law, than adopt the exposition of the Chancellor.

WARDEN

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\* It appears by an entry at the foot of the decree of the Court of Chancery, that the defendants John Browne and his wife were mistaken, for Rawleigh Travers Browne and Million his wife. The decree was therefore to be amended, in that respect, by consent of the parties.

**WARDEN** *contra.* The common law, upon the subject, cannot be revived, because it was repealed by the act of 1785, and has not been expressly revived by any statute since. There is no controversy, as to the moiety which he claimed from his brother, but the question merely is, as to that derived from his father. Which depends upon the sound exposition of the act of 1792; and the Chancellors decree contains a just construction of it. But in addition to that, it may be observed, that the act of 1792, only repeals so much of all other laws as comes within its own purview. Consequently no part of the act of 1785 is repealed, but what comes within the express provisions of the act of 1792. But if the present case is not within the act of 1792, then, it will be governed by the act of 1785, which, so far as respects the present case, is not repealed by the act of 1792; because it is not within its purview.

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**WICKHAM** in reply. The Legislature, by the act of 1792, intended to provide for all cases of intestacy. The interpolation, in the seventh clause, was not in the revival, prepared for the Legislature, but it was made by the Assembly themselves; which looks as if it was designed; and the Court cannot correct the oversights and omissions of the Legislature. The whole of the act of 1785 is incorporated into that of 1792. So that it is the same law, with the alteration; which the Legislature might make, if they thought proper. The circumstances argue an intention to do so; which intention ought to prevail. Had the 7th section been wholly omitted there might have been some grounds for Mr. Wardens argument on the act of 1785; but, as it is, there can be no pretext for the construction, he contends for.

*Cur: adv: vult.*

**WICKHAM** and **RANDOLPH** for the appellants. The 7th section is to be taken independantly; and then no provision having been made for it, by the

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act, it devolves upon the heir at common law: Which, regarding the blood of the first purchaser, is consistent with the views of the Legislature, manifested by the amendments and alterations in the act of 1785. These were introduced into the acts of 1790 and 1792, for the express purpose of restoring the estate to the family of the original purchaser. The statute of 1785, therefore, having been repealed by the act of 1792 (the title and object of which is to reduce all the acts, upon the subject, into one,) and the latter not having provided for the case, it must descend according to the rules of the common law; which, as to cases of this kind, are restored by the repeal of the act of 1785. For the Chancellor's interpretation, which goes to supply words in a law, cannot be admitted; because that is beyond the power of the court.

WARDEN and CALL *contra*. The estate must either go to the heir, at common law, escheat to the Commonwealth, or descend, according to the act of 1785, which, as to cases of this kind, we contend, stands unrepealed.

It cannot descend to the heir at the common law; because the common law, as to descents, was repealed by the act of 1785; and therefore, if the latter was repealed by the act of 1792, yet, as the common law was not expressly revived, by the last statute, it remains repealed; according to the express directions of the act of 1789 c. 9. p. 6: Which enacts, "that whensoever one law, which shall have repealed another shall be itself repealed, the former law shall not be itself revived, without express words to that effect." This applies as well to the common law, as to the statute law; and makes a revival absolutely necessary in both cases.

Therefore unless the act of 1785, is in force, as to these cases, there is no heir or other representative who can take the estate; but it must escheat to the Commonwealth for defect of heirs.

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Which would be a very harsh construction, when there are so many blood relations of the decedent living; and therefore the court will adopt it with great reluctance.

Nor is it necessary to make that construction; since the act of 1785 is in force, as to cases of this kind: For cases of this sort are, in terms, provided for, by that act; and are altogether omitted, in the act of 1792. But the act of 1792 only repeals so much of every other act, as comes within its own purview and provisions. Therefore as cases, like the present, do not come within the purview or provisions of the last act, but are embraced, expressly, in that of 1785, it follows, necessarily, that the act of 1785, as to cases of this nature, is not repealed.

This interpretation will be the rather made, because, by this means, the intention of the makers of the law, to distribute the estate amongst the next of kindred, will be preserved; and there will be a canon of descent, for every case, which can happen, while, the rule of primogeniture will not be suffered to revive, against the positive will of the Legislature; who have, anxiously, sought to destroy it, as repugnant to the genius of the Government, and the principles of justice.

*Curr: adv: vult:*

FLEMING Judge. There seems to be considerable difficulty, in construing the acts of Assembly, concerning the course of descents and the distribution of intestates estates, as they now stand in our statute books; and therefore, it may not be improper to take a retrospective view of the whole of them.

The Legislature conceiving, that the rule of descents by the common law was not well adapted to the genius of the people and the form of our Government, totally changed it, by the act of 1785; which appears to have provided for every possible case. But, in 1792, an alteration was made,

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made, in the case of infants dying without issue excluding the mother, when the inheritance was derived from the father, if there was living an brother, or sister of such infant, or any brother or sister of the father, or any lineal descendant of either of them. And *vice versa*, where the inheritance was derived from the mother.

These provisions are preserved in the 5th and 6th sections of the act of 1792: Which excluded any issue, which either the father or mother may have by any other person, than the deceased parent of such infant, where the inheritance was derived from such deceased parent.

So far the act is clear enough; but the difficulty arises from the words of the next section, which are, "If there be no mother nor brother, nor sister nor their descendants, and the estate shall not have been derived, either by purchase or descent, from either the father or the mother; then, the estate shall be divided into two moieties, one of which shall go to the paternal, and the other to the maternal kindred."

This clause would have embraced the present case precisely, were it not for the words, *and the estate shall not have been derived, either by purchase or descent, from either the father or the mother*; which in strictness except the present case, and being words of important signification, I do not think myself at liberty to reject them. For I do not think it proper, in the construction of statutes to supply, reject or transpose significant words, as is sometimes done in cases on wills; because, in removing one difficulty, others may arise, and greater inconveniences; perhaps, be introduced. Thus, to add the words *in case of an infant*, after the word *not*, might remove the difficulty in the present case, as it would then run in this manner. "And the estate shall not, *in case of an infant*, have been derived, either by purchase or descent, from either the father or the mother." By which interpolation the present case would not

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be within the exception, as George Waugh was of full age; but had he been an infant, the same difficulty would still have existed; and the practice might, perhaps, be sometimes extended beyond the intention of the Legislature, and cases might, by the aid of supplement, be frequently brought within the meaning of a law, which were never contemplated by those who made it. So that, besides, the impropriety, of the courts undertaking to make the Legislature speak a different language from that to be found in the statute book, the addition would not be co-extensive with the difficulties; and a new interpolation might become necessary, in each case that might arise. Some other more safe, and effectual mode of interpretation is therefore, to be sought for; and, I think, it is to be found, by a careful perusal of the acts upon the subject.

To me it appears, that it has been entirely owing to the mere inattention of the Legislature, and the unskilfulness of the person, who drew the act of 1792, that cases, like the present, have been left unprovided for; and that the Legislature did not intend, that so important a provision should have been, altogether, omitted. It is therefore proper, to consider, whether there be not a construction of the acts, that will support the intention of the Legislature? Which, evidently, was to provide rules of descent, for every possible case. And, I think, there is a plain natural interpretation which will effect this important object, without any violence to the text.

The 5th section of the act of 1785 fully embraces the case; and as the act of 1792 only repeals so much of other law, as comes within its own purview; and as the present case is not within the purview of the act of 1792, which has made no manner of provision for it, it follows, necessarily, that the act of 1785 is still in force, as to the present case: And thus a complete system of descents is established, agreeable to the view  
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of the Legislature without recurring to the danger of interpolation, which might, perhaps, produce more mischiefs than it would remedy.

With respect to the personal estate of George Waugh, the act of 1792, *concerning wills and the distribution of intestates estates*, directs that the goods and chattels of an intestate, if there be neither wife nor child, shall be distributed in the same proportions and to the same persons, as lands are directed to descend, in and by the act to reduce into one the several acts directing the course of descents, passed the same session, and is the one now under consideration. Both these laws have the same repealing clause. So that the act concerning wills, like that of descents, only repeals so much of other laws, as comes within its own purview.

But the act of 1785 *concerning wills and the distribution of intestates estates*, refers to the acts of descents of the same session, in the same manner, as that of 1792, concerning wills, refers to that of descents. Therefore, as, for the reasons already given, I consider the 5th section of the act of descents, passed in 1785, to be still in force, I think so much of the 24th clause of the act of distributions, made in the year 1785, as refers to that section, is also still in force; because it does not come within the purview of the act of 1792. My opinion consequently is, that the act of 1785, concerning the distribution of intestates estates, must give the rule for the distribution of the personal estate of George Waugh.

This way of considering the case obviates the objection made concerning the rule of the common law; which certainly has nothing to do with the question.

Upon the whole, I am of opinion that the decree, although founded on principles differing from those I have assumed, is substantially right, and ought to be affirmed.

CARINGTON

**CARRINGTON** Judge. Upon the statement made of this family, the question is, who are entitled to the estates of the deceased?

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The Legislature have passed three acts, relative to the course of descent. But the last, which passed in 1792, professes to reduce all laws upon that subject, into one; and by it, every possible case of intestacy was meant to be provided for: At the same time, that all prior acts, were intended to be repealed, as embraced within the provisions of the last. It becomes necessary therefore, to examine the meaning of the Legislature, in the clause in question, and to carry it into effect, if we can.

The act of 1792 proceeds to establish the different grades of descent for four sections; and then it makes an exception, in the case of infants dying entitled to property derived from one parent, declaring that the other, and the relations on that side, shall not succeed to that property; after which comes the seventh clause, which is in these words, 'If there be no mother, nor brother, nor sister, nor their descendants, and the estate shall not have been derived either by purchase or descent, from either the father or the mother, then the inheritance shall be divided into two moities, one of which shall go to the paternal the other to the maternal kindred, in the following course; that is to say, &c." going on in the next clauses, to state the rules.

Upon this clause the question, in the present case arises.

If it be taken literally, the plain meaning of the Legislature, throughout the subsequent parts of the law, will be defeated; and the intended purpose will be frustrated. But it is obvious, that a interpretation, tending to produce that effect, ought to be rejected, and the intent of the makers of the act observed, if possible: And I think it may



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may be done without any great violation of the text, or overturning any rule of construction.

The difficulty has evidently arisen, from the omission of a few words in the sentence. The exception, *and the estate shall not have been derived either by purchase or descent, from either the father or the mother*, ought to be understood relatively only; that is to say, it relates to the two preceding sections, respecting infants, and was not intended to apply to any other cases; for the first and latter parts of the section refer generally to all intestacies, which proves, that the intermediate words were intended to operate as an exception. The meaning, then, of the Legislature is obvious; and to express it in more intelligible terms, I think, we should add after the word *Not*, in the second line of the section, the words, *in case of an infant*: After which the clause will read thus "If there be no mother, nor brother nor sister, nor their descendants, and the estate shall not, *in the case of an infant*, have been derived either by purchase or descent, from either the father or the mother, then the inheritance shall be divided &c."

This supplement which according to the rule of expounding statutes, I think we have a right to make, should also be applied to the 14th, section of the act. By this means, the whole act will be rendered consistent, and all cases of intestacy will be provided for, agreeable to the meaning and intention of the Legislature. Which is certainly better, than, by adhering to the literal expression, to disappoint the will of the Legislature, and defeat the intention of the law altogether.

Therefore, although I do not exactly agree with the Chancellor, in regard to the manner of expounding the law, yet I agree with him in the conclusion; and consequently, am for affirming the decree.

LYONS

**LYONS Judge.** It is a rule in the construction of statutes, that the intention, when it can be discovered, must be followed with reason and discretion, although the interpretation may seem contrary to the letter of the statute. 11. *Med.* 161. 1. *Show.* 491. 10. *Rep.* 101. 10. *Mod.* 281. 4. *Com. Dig.* 338.

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Now it is evident, that when the Legislature were reducing the several acts of Assembly, concerning the course of descents, into one act, they did not mean to leave any case unprovided for; but through oversight, or too great anxiety to express their intention with caution, a difficulty has intervened; which, if taken literally, would frustrate the object of the Legislature and leave many cases without a provision. To avoid which inconvenience it becomes necessary to give a reasonable construction to the act, so as to effectuate the intent and meaning of the Legislature, expressed in other parts of the statute. This will be effected, by taking the whole act, and all other acts made on the same subject, into one view; moulding them according to the rule laid down, in *Hob.* 346, to the truest and best use; and, rejecting what shall appear to be inconsistent or absurd, and tending to defeat the intention of the Legislature. Thus giving, to the law, such a construction, as will make it answer, fully, the purposes for which it was enacted.

With these principles in view, I am disposed to affirm the decree of the Court of Chancery, upon different grounds than those given by the Chancellor; which I do not entirely concur with him in: Because by his mode of correcting the 7th section he makes it necessary to alter the 14th section; which might be going too far, and doing what the Legislature did not intend to do.

My own opinion is, that either, the whole interpolation, in the 7th section, ought to be rejected, as a saving repugnant to the body of the act,

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according to 1. Co. 47: Or that the act of 1785 is to be considered as not repealed, so far as respects such estates, as are not disposed of by the act of 1792. By either of which constructions, the estate derived from the father will be disposed of, and will descend agreeable to the decree.

This interpretation puts all right; reconciles the whole course of legislation upon the subject; gives complete effect to the statute; and fulfils the object of those who made it.

For these reasons; and not those given by the Chancellor, I am for affirming his decree.

PENDLETON President. To enquire from what source the force of the common law of England, in this state, is derived, would, at present, be a useless speculation; since all agree, that it is the general law of the land, where it is not taken away by our statutes.


That the act of 1785 has totally done away that common law, as to the course of descents, has not been, nor can be doubted.

The rights of primogeniture are wholly abolished; and wherever there are more persons, than one, of equal degree of kindred to the intestate, they share, equally, in the succession. The succession, in the right line ascending, excluded by the common law, is here permitted: The objection, to the half blood, is removed; and the enquiry, through what blood the lands had descended to the intestate, is abolished: The intestate is in all cases considered, as the unrestrained proprietor; and his supposed preference, from natural affection, pursued.

Under this act, it must be acknowledged, that no possible case, not provided for, can happen, so as to let in the rule of the common law.

Although this new system was generally approved, yet there were citizens who might wish, that, in case of their not having children, their lands

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should return to the family they came from: This, adult persons could provide for by their wills; but infants could neither make use of, nor exercise the power; for which reason, I suppose, and probably because the infant might not generally have other estate, than what was so devised, the Legislature, in 1790, passed an act, which declares, amongst other things, that an infant, dying intestate and without issue, having lands devised by decedent or purchase from father or mother, the other parent and relations, on that side, should be excluded from the succession; but this is confined to *infant* intestates, and, no otherwise, alters the general law. Then comes the act of 1792.

We are told, by the counsel, that we are confined, in construction, to the literal force of the words in the 7th clause; and no power, on earth, but the Legislature, could change it, was his emphatical expression. I will leave it to that gentleman to reconcile this to his observations on the act of 1789, when he read the title, preamble, and all the clauses of the law, for the purpose of confining the general term *law*, to statute law.

And was he not right in the latter case?

Among the rules laid down, for the construction of statutes, as collected by *Bacon*, are the following.

1. That, in the construction of one part of a statute, every other part ought to be taken into consideration, for that will best discover the meaning of the makers. 6. *Bac: abr: (new edition)* 380.

2. A statute ought upon the whole to be so considered, that if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant. 6. *Bac: abr: (new edit.)* 380.

3. And, in the case relied on, that where words are express, plain and clear, they shall be understood according to the general and natural meaning  
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and import, it is added, "Unless by such exposition, a contradiction or inconsistency would arise in the statute, by reason of some subsequent clause, from whence, it might be inferred that the intention of the Legislature was otherwise." 6. *Bac. abr. (new edit.)* 380.

The construction laboured, of the words of the 7th section, would render superfluous and insignificant the very important word *infant*, in the fifth and sixth sections; since it would put them and adults on one, and the same footing.

4. General words, in one clause of a statute, may be restrained by a subsequent clause, 6. *Bac. abr. (new edition)* 381.

This applies directly, as I suppose there is no difference, whether the restraint be in a prior or subsequent clause: Especially here, where the general words are used, by way of reference to the prior clause.

5. A remedial statute ought to be construed liberally, so as to suppress the mischief intended to be remedied, 6. *Bac. abr. (new edition)* 389.

The mischief was, the enquiry, when a man died intestate, perhaps at fourscore, how he came by his land; and this was done away, except in the single case of an infant dying intestate.

I will now proceed to the law of 1792. The title is, "An act to reduce into one the several acts directing the course of descents." which comprehended the two acts before stated (for I discover no other law;) and we find no change is made in these laws, except in the case of infant intestates extending the exclusion, in the October session of 1792, of one parent, where the estate came from the other, to the issue which the excluded parent may have by another husband or wife.

The act then proceeds to direct the descent in the several cases, as they may happen one after

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another, repeating, in each provision, that the prior case, provided for, has not happened. To his children or their descendants, if any be; if there be no children or descendants, then to his father; if there be no father, then to his mother, brothers and sisters and their descendants, or such of them as there be. Then comes the exception in the case of infants, from the act of 1792, with the extension of the exclusion to their issue; and then we come to the 7th section, supposed to be so powerful as to overturn the general system, placing adults intestates on the same footing with infants, as to the enquiry from which parent the estate came; and to let in the common law as to them, 'as well, as to infants.

That this was the intention of the Legislature was admitted by the counsel; and, indeed, is so plain, that he who runs may read; and we come to the question, whether we are compelled by force of the words to violate that intention.

The purpose of the clause was to proceed and make provision for the succession, if none of the cases, before provided for, should occur. It takes it up, after the fourth which provides for the mother, brothers and sisters, in case there be no children or father, and provides if there be no mother brother or sister, and the estate shall not have been derived by purchase or descent from either father or mother, plainly intending to take in the exception as to infants, but omitting to use the term *infant*.

I observed, that if this was to be understood as a substantive enacting clause, and taken strictly, the case of the children and father not being put, the division of the estate, between the paternal and maternal kindred must take place, in exclusion of the children and father.

The answer was, that these cases were before provided for, prior to the claim of the mother brothers and sisters: And the answer was, to me

perfectly

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perfectly satisfactory; because this clause did not intend to affect any of the former provisions, but to state those which had not occurred, and, in such events to provide for the new cases. In this statement it was necessary to notice the excepted case of an infant intestate; but in doing this, there is an omission in the description of the case, provided for in the fifth and sixth sections, from their leaving out the words, "in the case of an infant as aforesaid."

Is it not, then, consistent with the rules, for construction of statutes, that the court shall supply those words to make the clause conformable to other parts of the law, and to its general system? I have no doubt but it is.

The same observations apply to the 14th section; where the case of the infant is omitted, but yet not affected: Since that clause proceeds upon a supposition, that, under the former parts of the law, there is no impediment to the partition between the paternal and maternal kindred, and only provides for the case of there being but one of neither of those heirs.

If I had any doubt upon this point, I should be of opinion, that, in every case, if there could be one, in which the act of 1792 makes no provision, the act of 1785 would not, in that case be repealed, but would controul the common law. However, I am satisfied, notwithstanding the 7th section, that the enquiry from whom the estate descended, is confined merely to infants, and does not extend to the case of other intestates.

As the Court differ in their reasons, the decree is to be affirmed without alteration.

Decree Affirmed.

ROSE

## ROSE

*against*

## MURCHIE.

**T**HIS was an appeal from a decree of the High Court of Chancery, where Rose as executor of Banister brought a bill for relief against Murchie surviving partner of Donald, Frazer and company, James Frazer and David Maitland and Robert Maitland his attornies in fact. Stating, that on the 7th of January 1788 Banister gave his bond to Donald, Frazer & Co. for £ 200, being the conjectural balance of an account; but in fact only £ 172 9: 6½ according to account was due. That other transactions since (as per account annexed,) will reduce it to £ 43: 17: 7. That they have assigned the bond to Frazer, who was apprized of the errors, and promised to account, but had not. The bill therefore prays an account, and for general relief.

The answer of Murchie, states the assignment to Frazer, but that he was informed it was given for an unsettled account, and that it was taken without recourse. That he told him one of the discounts set up by the plaintiff was for a negro bought by Simon Frazer who was a partner of Donald, Frazer & Co. but that the defendant thought Simon Frazer only and not the company was liable for the negro.

The answer of Frazer, states, that he knows nothing of the transactions mentioned in the bill, except that Donald, Frazer & Co. being indebted to Thomas Frazer & Co. of which last named house the defendant is a partner and their agent and assignee, the defendant Murchie as surviving partner of Donald, Frazer & Co. assigned the said bond to him in discharge of the debt due Thomas Frazer & Co.

A is indebted to D, F & co. by bond; A dies, and at the sale of his estate, by his executors, F the acting partner of D, F & co. buys a slave; which he carries to his own plantation and there continues him:— The amount of the purchase for the slave is a good discount against the bond.



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The answer of the Maitlands, states, that they assisted in the settlement between James Frazer and Donald, Frazer & co: And that the bond was signed without any knowledge of any equity against it.

The deposition of a witness, proves that Simon Frazer was the acting partner of Donald, Frazer & Co.

Another witness, proves that there were mutual dealings between Banister and the company, and between the plaintiff and the company after Banister's death. That Simon-Frazer bought two sows and a negro named Rochester, at the auction by the executors of Banister's estate. That bonds were generally taken of the purchasers at the sale except in a few instances, where discounts were admitted; that if Frazer's bond had ever been applied for, he should probably have been the person who made the application as he took several bonds from purchasers residing in the town of Petersburg. That he charged the two sows and the negro in the following words "Simon Frazer 2 do (sows being mentioned above) at 48/6 spotted and black with one ear. Simon Frazer, Rochester £83:5:0."

Another witness says, that Rochester was always kept at Frazer's plantation, and considered as his property.

The Court of Chancery referred the account to a commissioner, who corrected several articles but submitted it to the court whether credit for the two sows and the negro Rochester was to be given to the plaintiff?

The Court of Chancery confirmed the report and allowed the plaintiff a credit for the two sows and the negro.

Upon application for a bill of review, the cause was reheard by consent. When the Court of Chancery was of opinion, that the plaintiff was not entitled to a credit for the two sows and the negro,

negro, and decreed accordingly. From which decree Rose appealed to this Court.

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**HAY** for the appellant. Although it is generally true, that a debt due from an individual partner cannot be set off against a company demand, yet there are strong reasons to believe, from the circumstances of the case, that the purchases here were intended to be on account of the company debt; and, under that impression, that the executor took no bond, which indeed was never offered by Frazer: Who thereby shewed his own conception of the transaction. Consequently, it would be unreasonable, that the confidence, reposed in him by the executor, should expose the latter to the loss of the debt.

**BENNET TAYLOR** *contra*. It is a general principle, that if one does an act, it is as an individual, unless it be shewn, that he did it in a different character. Therefore Rose ought to have shewn, that the purchase was made in his social, and not in his individual character; or else he reverses the general principle. But, in this case, there is the most conclusive proof, that the purchase was actually made in his individual capacity, and not as a partner; for the articles are set down to him, and not to the company; and the slave is proved to have been carried to his own private estate, and there kept as his own property: Which removes every possible presumption, that the purchase was made, for the benefit of the copartnership. Besides the articles bought were not of a mercantile nature, or purchased in the course of trade; and therefore the company could not be charged with them. Because a transaction of a single partner, unconnected with the nature of the business, does not bind the company 7. *Term. Rep.* 207: And this principle is correct; for otherwise it would be in the power of one partner to ruin the concern, by improvident schemes, of which they have no knowledge, and of which, consequently, their approbation, cannot be presumed.

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WICKHAM in reply. Although an individual partner will generally be understood to buy for himself, yet circumstances may rebut it. The executor might think the purchase was only a continuance of the transactions between his testator and the company; and if Rose had called for payment or a bond, Frazer would certainly have refused, whilst the companies debt remained unsatisfied.

*Cur. adv. vult:*

PENDLETON President. Delivered the resolution of the court to the following effect:

In January 1788, Banister gave his bond payable to Donald, Frazer and company for £ 200, the supposed balance of dealings of Banister with that company, and another mercantile house of Robert Donald and company, blended together; in both which Simon Frazer was the active partner, and as such took the bond.

In 1793, Murchie assigned this debt, with a large number of others due to Donald, Frazer and company, to James Frazer assignee of Thomas Frazer and company of Britain, for a large debt due to them from Donald, Frazer and company; which debts James Frazer appointed the Maitlands to collect, who sued Rose the executor of Banister, upon the bond in the name of James Frazer as assignee as aforesaid. Rose confessed judgment, reserving his equitable defence; and filed this bill stating, that Banister's bond, intended to include the balance due to both companies, was taken, without settlement, for a conjectural sum, far exceeding the real balance. He therefore prays an injunction; that the accounts may be adjusted, and the real balance paid.

Upon the several answers coming in, a replication is filed, and depositions taken. An order was made by consent, referring it to a commissioner to settle the accounts between the parties. Commissioner Hay reports the settlement, stating a balance of £ 41 : 3 : 7 to be due from Banister's estate,

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ate, unless the estate was entitled to a credit of £ 83: 5, for a slave and two fows, purchased by Simon Frazer at a public sale of that estate. If that was allowed, the balance of £ 43: 15 would be due to the estate, with interest from April 1790.

To this article, the dispute between the parties is confined: All other parts of the report being submitted to.

The facts are, that Simon Frazer was the acting partner of both companies; that, with him, the extensive dealings of Banister were transacted; and all the other articles, credited in the company's account, delivered to him or his order; and no account subsisted between them in the individual character of Frazer. And that, Frazer, at the public sale, purchased the articles, which are charged to him, without any agreement or even conversation, about the application of the money.

Bander, who acted as clerk at the sales says, he expected the amount was to be credited in the company's accounts, not then liquidated, and gives his reasons. That the sales were upon credit, the purchasers giving bond and security, which was generally given, except where the executor allowed discounts to creditors. That he took the other bonds, and was not directed to take Fraser's; nor was one required, as far as he knows, or believes.

M'Donald says, that the slave purchased was always kept at Frazer's plantation, and considered his property, until he and other slaves, were conveyed, in a deed of trust from Frazer, to the laithlands and others.

Upon these facts the commissioner reported his opinion in favour of the amount being charged to the company; and the Chancellor in his first decree confirmed it, making the injunction, to the defendant on the bond, perpetual; and decreeing the defendant to pay the £ 43: 15, with interest from

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from April 1790, (the day of payment for the sales) and costs.

Upon a rehearing, by consent as on a bill of review, the credit was disallowed; the injunction dissolved, as to the £41:3:7, interest and costs and perpetuated as to the residue. The appeal from the latter decree.

The rule, that the private debt of a partner cannot be set off against a company debt, does not apply; since the question is, whether, it was such a private debt, or a payment of the company debt to that partner, who, it is agreed, had authority to receive it?

In *Scott and Trent* in this court, \* the articles for which the discount was claimed, were confessedly delivered to the acting partner, on his private account; and, on a state of them, it was ordered, that, when settled, the balance was to be credited in the company's account. That private account had not been adjusted, so as to fix the balance; and, on that ground, the discount was not allowed. But even there, the court said, Scott might be relieved in equity. We are in the court.

In considering this subject, the court viewed the situation and practice of the country, as to the present subject. Simon Frazer, or any other man is the ostensible merchant opening a store, for retailing goods and purchasing commodities: It is the store, which gives him credit, and that is answerable for any commodities furnished, whether it belongs to him alone, or to a company of which he is a partner, or for whom he acts as factor. True it is, if the company fails, the creditor may resort to the agent or factor, on the common principle of master and servant, where both are liable. As to the article furnished, not being within the nature of the trade, how is the planter to know the

\* 1. Washington's Rep. 77.

the objects of the trade? He takes goods, and, to pay for them, sells the merchant whatever he is willing to receive; tobacco, wheat, a horse, a slave, or any thing else, for which he is usually credited in the store books, without enquiry for whom purchased, or how applied. Here the slave was sold to Frazer, still the acting partner, and no bond was required, as in the case of a creditor. He was not a creditor; in his private character, but as a partner of the company; and, in the store book, the estate was entitled to a credit for the amount; which leaves the estate a creditor of Donald, Frazer and company, for £ 43:15; to whom, or to Simon Frazer's estate, the executor of Banister may resort for satisfaction; but he has no claim, as to that, upon the defendant James Frazer; although he is bound, so far as the debt assigned him was paid.

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The last decrees are to be reversed with costs, and the first affirmed.

## DEANS

*against*

SCRIBA & al.

**T**HIS was an appeal from a decree of the High Court of Chancery, where Scriba Scroppal and Starman brought a bill against the Deans for an account of the sales of goods consigned by the plaintiffs to the defendants, and for payment of the balance due with interest.

A party, who takes no steps to procure the testimony of a seafaring witness, is not entitled to a continuance of the cause.

The answer admits the consignment, without instructions whether to sell for cash or on credit. States, that the defendants sold some for cash and others

A consignee, who neglected to render an account of the outstanding debts for five years, charged with the amount.

The Court of Chancery, on debts not bearing interest, in terms, cannot carry interest down below the decree.

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others on credit; and have made several remittances. That there are £ 325 : 5 : 7 of outstanding debts. That the plaintiffs left with the defendants a cask described to contain snuff boxes, and directed some to be forwarded to Baltimore to M'Grea and Deans, to be left with the vendue master on account of the plaintiffs; which the defendants complied with.

The Court of Chancery referred the accounts to a commissioner. Who reported that he had appointed, at the instance of the plaintiffs agent, the 27th of September 1793 for carrying the decretal order into effect; notice of which not being served on the defendants on the 6th of November 1795, he appointed the 27th of that month for the purpose, but the defendants failing to attend, he appointed the 20th of September 1796, on the 14th of which month the plaintiffs agent and James Deane attended, and Deane having filed his affidavit that Rose a material witness was absent on a trading voyage, further time was allowed. That the commissioner afterwards appointed the 21st of April 1797, that a notice to this effect addressed to James and Thomas Deane was served on Francis B. Deane, who appeared on the 26th of May and said the notice was not legal as to James and Thomas Deane, because he Francis B. Deane was not a partner of the house of James and Thomas Deane, when the transaction happened, although he was at the then time of making the objection a partner in the business. That the said Francis Deane then agreed, that if the report was postponed to enable James and Thomas Deane to take the deposition of Rose, the report might be made to the September term and that a decree should be entered up at that term, and that the said James and Thomas would write to that effect, but as they had failed, he proceeded to report, making a balance of £ 495 : 15 : 3 due from the defendants to the plaintiffs.

The

The defendants excepted to the report: 1. Because the notice was not legal: 2. That the defendants were debited with the outstanding debts. 3. That no commission was allowed the plaintiff. 4. That the defendants were debited with £.94 3:9 Pennsylvania currency, for a box of hardware.

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}

A witness examined for the plaintiff states, That, in 1785 or 1786 he received from the defendants a large case said to contain hardware; but no invoice or instructions to sell the same were given. That it was afterwards taken away and sent, (as he understood) to Philadelphia.

The Court of Chancery re-committed the report. And the commissioner in his second report stated, That he appointed the 3d of March 1798; That he received a letter from James Dean requesting a postponement until the 7th, when he attended with an affidavit to prove that Rose had sailed for New York, and prayed a continuance until he could procure his testimony. But as it was not proved that any steps to take his deposition had been taken, he refused the continuance. That Francis Dean on the 26th May attended; and on behalf of the other defendants agreed that if the report was delayed till September a decree might then be entered up.

There is an affidavit on the 13th February 1798 stating that Rose had sailed from New-York to London, and was to remain there until April next, and that the deponent has reason to believe he will return to Philadelphia.

There is an invoice of the box of hardware, signed by the plaintiffs, which is headed as follows, "Contents of a box of fundries marked A. No. 20" "consigned to Messrs M'Grea & Deans at Baltimore, with the prices affixed to, in order to direct them at the sale of public vendue."

Upon the coming in of the second report, which made no alteration in the first, the Court of Chan-



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cery decreed the defendants to pay the whole £ 495:15:3 with interest on £ 439:11:1 from the 15th of April 1790 until paid. From which decree the defendants appealed to this Court.

CALL for the appellants. The notice was insufficient, for the law requiring actual notice to the party or a written notice to be left with some free person at the dwelling house, one of those requisites must be complied with; which has not been done in the present case. Further time ought to have been allowed the appellants, to procure the testimony of their witness, as they state him to have been material. The box of hardware was sent to Baltimore according to the directions which had been given; and there is no proof that it ever came to the hands of the appellants afterwards. Of course they ought not to be charged with it. The appellants were justifiable in selling on credit, and therefore the plaintiffs should bear the loss of insolvencies, if any, and the decree should have been, that the balance, in their hands, should be dischargeable in the bonds and debts due, for the sales of the goods consigned.

DUVAL *contra*. Contended that the notice was sufficient upon the circumstances of the case. That time enough had been allowed the appellants to take the testimony of their witness. That the evidence shewed, that the box of hardware was taken away by the order of the appellants. And that no regard should be had to the objection concerning insolvencies; because none had been shewn to exist, from 1786 (the date of the sales of the goods, as appears by the commissioners report, and the defendants own account) to this time: Which is fourteen years.

PRNDLETON President. Delivered the resolution of the Court, as follows.

On the principle question whether the Court of Chancery erred, in not giving a further indulgence

gence to the appellants, on account of his witness Hickman Rose, the Court have no difficulty. The commissioner had indulged them from 1792 to 1797; and, during that time, the witness, who was a seafaring man, was going abroad and returning to America from time to time; and yet it does not appear, that the appellants had taken any steps to provide for taking his deposition, whilst he should be in America.

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But the principal dispute was, whether he should be accountable for the outstanding debts? On which subject, it does not appear that Rose was material. And, above all, it is remarkable, that, they never, in the five years of litigation rendered an account of those debts, stating which had been collected, or remained due; and whether any of the debtors, and who of them, were insolvents; which was in their own power, and which they ought to have rendered: Therefore the Court is of opinion, that they ought to stand chargeable for the amount; and that, so far, there is no error in the decree.

But as to the sum of £75:7 Virginia money, allowed by the commissioner for a chest of Hardware, that article is not sufficiently supported by the testimony; and ought not at present, to be allowed; but, as there seems some colour for the demand, that it ought to be left open for further enquiry. Therefore, that the decree, as to so much, ought to be reversed, with liberty to the appellees to make further proof, if they can, for establishing that part of their demand.

The Court then considered the question, whether the decree as to the remaining claim was right, in continuing the interest to the time of payment, instead of the time of entering the decree?

The case of *Skipwith vs Clinch*, \* has been reviewed; and the question examined upon principle

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\* Ante 253.

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ple and authority: And upon the fullest investigation we are unanimously of opinion, that in all cases of simple contract, not bearing interest in their original, but on which, at law, interest is given by juries in the way of damages, the interest in equity can only be continued to the time of entering the final decree; and in the present case the Court fix the interest to the period of entering the decree, on that part of the demand, which is affirmed. We are satisfied, that many decrees, for this contingent interest, have been affirmed; but they passed *sub silentio*, and never were considered until the cause of *Skipwith vs Clinch*, which is now approved of, and considered as giving the rule in future.

The decree was as follows,

“ The court is of opinion, that there is error, “ in so much of the said decree as allows the appellees seventy five pounds seven shillings, for “ a chest of hardware and the interest charged by “ the commissioner and accruing thereon, that “ article not being sufficiently established by the “ testimony in the cause; that there is also error “ in so much of the said decree as to the residue “ of the demand, which omits to allow the commissions for collecting the outstanding debts “ charged to the appellants and which continues “ the interest thereon to the time of payment, instead of computing it to the time of the decree “ and making the recovery to be of the aggregate “ of principal and interest. Therefore so much “ of the said decree, as is herein stated to be erroneous, is to be reversed with costs, and the “ residue affirmed, with this direction, that the “ commissions for collecting as aforesaid be allowed, and interest be computed on the balance to “ the time of entering the final decree, (as to that “ part,) in the said High Court of Chancery, in “ pursuance hereof, the appellants having unjustly “ delayed the final decree, by their appeal to this “ court: But the appellees are to be at liberty to

“ make

to make further proof of the article aforesaid, in the said High Court of Chancery, within a reasonable time to be limited by the said court."

*Dennis  
vs.  
Scriba*

## ROBERTSON

*against*

CAMPBELL and WHEELER.

**T**HIS was an appeal from a decree of the High Court of Chancery. The bill states, that the plaintiff's brother was sued in Philadelphia, for 240,000 lbs. tobacco. That the plaintiff and Shore and M'Connico became his security to Wilton the creditor, for payment thereof. That the plaintiff conveyed property, to Shore and M'Connico, as counter security. That payments were made, which reduced the debt to 70,000 lbs. tobacco, and £ 200 sterling on a protested bill. For which balance suit was brought, judgment obtained, and an appeal taken to the General Court, where the judgment was affirmed in October 1787. That the plaintiff sold ten negroes, at vendue, and applied the amount to the discharge of the judgment, at which time the defendants advanced the plaintiff 20,000 lbs. tobacco, worth 22/ per cwt. which was likewise applied in payment of the judgment. That for this advance, the plaintiff delivered the defendants two slaves (shoemakers by trade) as a security; and the defendants were to have the profits of them, for the use of the tobacco lent. That their profits were 20/ per week. That the deed was drawn by the defendant Campbell; and is in form an absolute conveyance the plaintiff believes, although intended only as a security. That, afterwards the defendants, with the plaintiff's consent, sold a female slave and children, for 4520 lbs. tobacco; and applied it towards re-pay-

What shall  
be considered  
as a mortgage,  
and not a con-  
ditional sale.

ment

Robertson  
vs  
Campbell.

ment of the loan; leaving a balance then due of 15,750 lbs. tobacco, besides interest. That, on the day of the sale of the slaves, 30,135 lbs. tobacco, and £ 207 sterling, was the balance due Wilson: Who agreed, in consideration of the hardships the plaintiff laboured under, that if the plaintiff paid the defendants the said balance by the day of        he would remit        of the damages on the affirmance of the judgment. Whereupon the plaintiff sold his blacksmith, but fell short of payment, 2560 lbs. tobacco, and £ 38:8. With which payment, however, the defendants appeared satisfied, as by a statement of the judgments in Wheeler's writing; which does not mention the damages. That the plaintiff hoped the profits of the shoemakers would have been applied to the discharge of this balance; especially, as the debt was assigned by Wilson to the defendants. That the defendants have issued execution against the plaintiff for        tobacco and will not remit the damages as Wilson had promised. Therefore the bill prays, that an account may be taken of what is due on the judgments, and of the hire and profits of the slaves; that the damages may be remitted; and the defendants enjoined from further proceedings; and for general relief.

The answer admits the judgment; but denying that the 20,000 lbs. tobacco was advanced on mortgage, insists that the defendants bought the shoemakers absolutely, at 16000 lbs. tobacco, and the woman and children at 4000. Refers to the bill of sale. Admits the promise to the plaintiff that, if he repaid the tobacco in the course of the season, they would return the slaves; but insists that this was no part of the original contract; and that they had, positively, refused to advance the tobacco on mortgage. That if the slaves had died they would have been the defendants' loss. That the defendants purchased with reluctance, and only to serve the plaintiff. Admits the agreement to release the damages, and to take, in lieu thereof, 5 per cent, provided the tobacco debt was paid.

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*vs*  
 Campbell.

discharged, on or before the first of May 1788, and the sterling money debt, on or before the first of July 1788; but states, that no part of the sterling debt was paid until January 1789. Admits that the defendants are entitled to the benefit of the judgments; and alleges that the complainant indebted to them, on other accounts.

A witness says, that sometime after he had heard, from the plaintiff, that he had let the defendants have the use of the shoemakers for an advance of 20,000 lbs. tobacco, the deponent was in conversation with the defendant Campbell, who observed to him, that it was a kind of property he did not wish to lay his money out in; which conveyed to the deponent an idea, that Robertson had a right of redemption, but there were no words respecting the instrument of writing, which secured their services. That the deponents reason for thinking the bargain advantageous was, that the plaintiff said, they produced £50 per annum.

Another witness says, that he was present at the bargain. That the plaintiff was to let the defendants have the use of the shoemakers for an advance of 20,000 lb. of tobacco. That he considered the plaintiff, notwithstanding the bill of sale, as having the right to redeem. That the value of the use of the slaves was estimated at 20/ per week, or £52 per annum. That he understood the woman and children were to be sold in order to pay part of the balance due upon Wilson's judgment; but understood afterwards, that the plaintiff had consented, that the proceeds should be applied towards repayment of the 20,000 lb. tobacco. That the deponent being informed by the defendant Campbell that the defendants were about to issue execution upon the judgments, he observed to them that as the balance was small, it was hard to exact damages; whereupon Campbell observed, that Robertson and Scott were indebted to him, and he knew not how else to recover the money. That

in

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in January 1789, the plaintiff paid through J. Barret £ 270, on account of the judgment on the sterling debt. To a question put by the defendants, whether it was an absolute sale, he answered that the defendants did object to any but a positive conveyance, and possession of the negroes; although the deponent supposed, that was owing to the embarrassed situation of the plaintiffs affairs; that he does not recollect that any time of redemption was specified, but the defendants were to have the use of the negroes till that took place.

Barret says, That being indebted to Archibald Robertson, he gave his bond to the defendants on the 10th of January 1789, for £ 300, with interest which he understood, the defendants, received, as a payment from Archibald Robertson, on some account.

A fourth witness says, that the defendants, when they paid for the slaves made a memorandum in their day book, that the plaintiff was to return the price paid for them in six months; and they in the mean time were to have the hire or value of their labour. That the absolute right, as per bill of sale in and to the said property, if the plaintiff failed so to do, was uniformly declared to be vested in the defendants. At least the defendants said so.

A fifth witness says, that Shore & M'Connico did charged 20,000 lb. tobacco on account of Wilson's judgment, by the sale of the shoemakers to the defendants. That therefore he does not think they or Robertson would have been affected by their death. That the defendants refused to take a mortgage through fear of a Chancery suit.

Several witnesses prove the value of the slaves and their yearly profits.

The bill of sale was as follows:

" Know all men by these presents, that I William Robertson in and for consideration of

" quantity

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quantity of twenty thousand weight of Petersburg crop tobacco to me in hand paid and satisfied, the receipt whereof is hereby acknowledged, have this day bargained, sold and delivered unto James Campbell and Luke Wheeler, four negroes, to wit, Frank White and David White shoemakers by trade, Fanny and her child at the breast. And I do hereby warrant and defend the property in the before mentioned negroes and their future increase unto the said Campbell and Wheeler their heirs and assigns forever, against all manner of persons whatsoever claiming, or who may hereafter claim the same. As witness &c."

The Court of Chancery decreed in favor of the defendants; and Robertson appealed to this Court.

WICKHAM for the appellant. Although the conveyance was absolute, yet the consideration was a loan; and the conveyance was intended merely to secure the repayment of the money. The evidence of M'Connico is conclusive as to this, and his deposition is strengthened, by other testimony in the cause. If this evidence had been part of the bill of sale, there would have been no doubt; and the defendants apprehensions of a suit in Chancery, which prevented its being inserted, further strengthens the case. It may perhaps be said, that there was no covenant to redeem, or to repay the money; but that would apply to most cases of mortgage; and the plaintiff would still have recovered the money, like the case of a lost pawn. *Co. Litt. 89. Salk. 522.* Besides *Ross vs Norvell 1. Wash. 7.* is decisive upon the subject. The hire of the slaves was to go against the interest of the money; which is a mortgage expressly.

But the contract was usurious. For it was, as before stated, a contract for a loan; and the hire of the slaves was worth more than the interest of the money. 2. *Dougl. Low vs Waller.* The con-

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tingency was merely colourable; which is not sufficient to take it out of the statute. 5. Co. 69. *Burton's case*. Ibid. *Clayton's case*. *Cowp.* 770.

Wheeler's statement says that the damages stand conditional; and, if the profits had been rightly applied, nothing was due, at the end of the year 1791.

The decree is therefore erroneous upon all the points, and ought to be reversed.

**CALL contra.** It was not a mortgage; because the sale was absolute, and the plaintiff had only a power of repaying the money, by way of repurchase. 2. *Fonbl. Eq.* 267. 1. *Pow. Mortg.* 156. In which respect it is less strong, than the case of *Chapman vs Turner* \* in this court. Where one gave an instrument of writing to another, stating that he had received £ 30, and had put a slave as a security into the hands of the other; who, if the money was not paid on or before a certain day, was to have the slave for the £ 30. This was held to be no mortgage, but a conditional sale, and irredeemable. Such a construction is more reasonable, in the present case; because the defendants had no other security for their money; and, if the slaves had died, the debt would have been, irretrievably, lost.

There is no pretence for saying, that the contract was usurious; because the sale was absolute, and but a mere indulgence to repurchase allowed. Besides the defendants did not loan any thing to the plaintiff; and, consequently, there could be no usury. For, in order to constitute usury, there must be a borrowing and a lending.

The plaintiff not having paid the lesser sum in time, the defendants were entitled to the whole debt, and to the 10 per cent damages also. This is the constant rule. For, unless the money is paid

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\* 1. Call's rep. 280.

aid in time, the condition is forfeited, and the debtor has no equity, or conscience on his side. But the present case is stronger; because there was an express stipulation to that effect.

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Campbell.

The defendants are entitled to interest on the 5 per cent damages; because it is a judgment; which is an ascertained sum. And Robertson and Scott's debt ought to be deducted, because the plaintiff was bound for it.

If the plaintiff were even entitled to redeem (which is denied) yet he would not have any right to an account of profits, because it was agreed, that they should go against the interest. At any rate, he would only have been entitled to the profits actually received, and not to such, as might have been made, by the greatest care. For the defendants would not have been bound to use extraordinary attention: and the plaintiff might have put an end to the loss by payment of the money. 2. *Pow. Mort.* 272. Besides, those, who come into equity for an account, must take it as they find it.

HAY on the same side. There is a striking difference between a mortgage and a conditional sale. *Pow.* 37. 2. *Fonbl.* 237. 1. *Vern.* 268. and *Chapman vs Turner* in this Court. Robertsons right, in the present case, was only that of a conditional sale. For the deed was absolute; and he had only a right to re-purchase. Although parol evidence may be received to explain an absolute deed, yet a mortgage will not readily be presumed against an absolute conveyance. *Fonbl.* 267. The answer denies that it was a mortgage: and *Pow.* 50, shews that the answer may be used to prove the nature of the agreement. The answer will prevail against a single witness although positive, which M'Connico is not; for he only states his opinion. There was no disproportion in the price; but if there was, that is nothing in a conditional sale, 1. *Vern.* 268. The property was delivered in the present case; which differs it from that of *Norvell vs Ross* 1. *Wash.* 17. There was  
no

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no loan; for none is proved: and it is not likely that the defendants, who were merchants, would wish to lend, when they could have made greater profit on it, in the course of their business.

If tobacco had risen, the defendants could not have insisted on a loan; and therefore the right would not have been reciprocal, *Com. Dig.* 299.

The condition for remitting the damages, was not complied with; and therefore the plaintiffs have no claim to it, *Pow. Contr.* 213. Because the contract could not continue, as the term for performance was past.

WICKHAM in reply. The case of *Chapman vs Turner* is not like this. For there the whole case was reduced to writing, and nothing concealed, which was a strong circumstance in favor of the purchaser. Besides the full value was given in that case; but not in this. 1. *Pow. Mortg.* 156 was the case of a rent charge: and the exception proves the rule.

*Cur: adv: vult.*

PENDLETON President. The first question in this case is, whether the transaction, between the parties, respecting the two negro shoemakers put into the possession of the appellees for 1600 lbs tobacco, is to be considered as a mortgage, or conditional sale?

That there is a difference between those modes of transfer, and that they produce different consequences is certain. In the case of a mortgage, the estate is at all times, redeemable, until a decree of foreclosure passes, or a dereliction of the right to redeem is presumed, from the length of time. In the other case of a conditional purchase the time of performing the condition must be strictly observed. These rules are seldom controverted; but the questions have generally been, to which class the transaction discussed belonged?

And

And this must always depend, on the whole circumstances of the contract; and is not confined to the mere written evidence of it.

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In *Chapman vs Turner* \* the writing imported to be a mortgage, drawn by Chapman, an overmatch for Turner an uninformed planter, but the circumstances stated in the report of that case, abundantly shew that a purchase was the intention of the parties, and not the loan of money: Which Turner constantly refused; and purchased and paid his money, under an agreement, only, that the slaves should be restored, on repayment of the money, without interest, at the next Hanover Court.

Chapman did not then, or during his life, offer to return the money: but his widow after his death and when the slave, who was a female, had two or three children, tendered the money, and demanded a redemption by her suit: Which was justly determined against her.

On the other hand, in *Ross vs Norvell* † altho' the bill of sale was absolute, as in the present case yet, on the circumstances, it was decreed to be a mortgage, and Norvell let into a redemption upon the usual terms.

It must often happen, in disquisitions of this sort that there will be difficulty, in drawing the line, between those two sorts of conveyances. The great *desideratum*, which this Court has made the ground of their decision is, whether the purpose of the parties was to treat of a purchase, the value of the commodity contemplated, and the price fixed? Or whether the object was the loan of money and a security, or pledge, for the repayment, intended?

The former was the case, in *Chapman vs Turner*: The latter, in *Ross vs Norvell*. Then, what is the present case? And what commenced the treaty between the parties? We hear not a word of

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\* 1 Call's reports 280.

† 1 Washington 14.

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 Campbell.

of purchasing slaves, nor any consideration had of the price, for which, Robertson was willing to part with the property. On the contrary, Welford states, that the 20,000lbs. tobacco was the estimated value of the four slaves; importing, that the estimate was made, for the purpose of considering, whether they were a sufficient security. The real agreement was, that they should be a security only; that the woman and child should be sold, and the produce applied to discharge the debt; and, for the balance, that the two shoemakers should remain with Campbell and Wheeler, and their profits applied to discharge the interest, until the balance should be repaid.

Why then was the absolute bill of sale taken? The appellees furnish the answer: That it was the justice of this Court allowing redemption in case of a mortgage. An attempt, which the Chancery has constantly repelled, wherever it appeared, that the real contract was a mortgage, and which this Court have no difficulty in frustrating, upon the present occasion; allowing a redemption of the slaves, upon the usual terms; that is to say, that Robertson shall be charged with the principal and interest, and any other just demand, which Campbell and Wheeler may have against him, and they to be accountable for the profits, realized by them, and no farther; unless, in the case of gross negligence to employ them.

The objection that Campbell and Wheeler risked the lives of the slaves, since they could not have recovered their money, if the slaves had died, was truly said, to be, only, another state of the question; which would, upon the evidence, have been decided the same way.

The agreement to set the profits against the interest, since, on any view of the subject, they will appear greatly to exceed the legal rate of interest, is so far usurious, and void; and the account is to be taken on the usual terms, where the mortgage

in possession; to charge the profits against principal and interest.

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The remaining question respects the damages recovered upon the affirmance of the common law judgment in tobacco; which, in April 1788, were agreed to be remitted, on condition, that the balance, with interest, was paid by the next month; or, as the appellees explain it, during the season.

That the rule is, as stated by the counsel, "that on an agreement to remit part of a debt, on condition the residue is paid within a certain time, the condition must be strictly performed," is unquestionable; but surely the creditor may, by his consent, enlarge the time: Which appears to have been done in the present case. This intention of keeping up the strictness, expressed by Wilson, was to be a *stimulus*, to Robertson, to exert himself, in raising the money, in time, and the creditors, discovering, that he had done so, and probably made sacrifices to effect it, as it appears he did of £ 30 in Barrett's bond, and he says he did in the sale of a valuable blacksmith, meant not to insist on a forfeiture; although, he had not fully completed the payment. Accordingly, we find, that, as to the money on demand, they wholly remitted the damages; although, the balance was not paid, until November 1794; and, as to the tobacco, no damages are charged, but the balance with interest, only in August 1791; which amounts, then, to no more, than 3051 lbs. of the value £ 34:6:5. In the same account, they state the damages of 10,837 lbs. tobacco, to stand conditionally: Intended, no doubt, to keep up the stimulus, for payment of the balance; as they never could mean, to make Robertson pay that enormous penalty, for his default, in paying less than a third of the sum. Or if they did, a Court of equity would set to very little purpose, if they did not relieve against it, upon making just compensation. That compensation, in equity, is fixed, at the interest of the money, in cases of this

fort;

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fort; and not the profit, which they might have made, with the tobacco, by speculation in a basket of earthenware, or otherwise. Indeed, it appears, that, in a conversation afterwards with a friend, who intimated, that it was hard to insist upon it, Mr. Campbell seemed to concede that it was; and then, as well as in his answer, said, that his view was, to cover, by that means, a doubtful debt, due from Robertson and Scott. That debt he will be allowed, in the account to be taken under the mortgage; which will remove the objection: And we think the damages ought to be wholly remitted; as they were in the case of the money, under the same circumstances.

The decree is to be reversed with costs; and one, to the following effect, entered,

“ The court is of opinion, that although the  
“ writing, in the proceedings mentioned, pur-  
“ ported to be an absolute bill of sale, yet, as the  
“ real intention of the parties, at the time of the  
“ contract, was a loan of the 20,000 lbs. tobacco,  
“ and that the four slaves should be pledged, as a  
“ security for the repayment, the same ought to be  
“ considered as a mortgage; and the appellant let  
“ into a redemption of the two slaves, remaining  
“ unfold, upon the usual terms of his being made  
“ chargeable for the 16000 lbs. tobacco and inter-  
“ est, and any other just debt, for which he may  
“ be liable to the appellees. Against which, he is  
“ to be allowed the profits really made of the slaves,  
“ by the appellees; and no further, except for the  
“ time in which they may have grossly neglected  
“ to employ them. That the appellant ought to  
“ be relieved against the damages, on the tobacco,  
“ recovered by the judgment at common law, up-  
“ on payment of the balance of principal and in-  
“ terest: And consequently, that the said decree  
“ is erroneous. Therefore it is considered that  
“ the same be reversed &c. and the court proceed-  
“ ing to make such a decree as the High Court

“ of

of Chancery ought to have made. It is decreed  
 and ordered, that an account be taken between  
 the parties according to the principles of this  
 decree; and that upon payment of the balance,  
 if any, which shall be found due to the appellees,  
 and the costs in Chancery, they shall deliver the  
 slaves, if living, to the appellant; to be held,  
 as of his former property therein, and, if a bal-  
 lance shall be found due to the appellant, that  
 the appellees be decreed to pay the same to  
 him."

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 Campbell

## HALCOMB

vs  
 Flournoy

## FLOURNOY.

**F**LOURNOY brought debt in the District  
 Court, against John Halcomb, Philemon  
 Halcomb jr. William Watts, and Joseph Scott jr.  
 upon a bond, given to Flournoy as High Sheriff;  
 with the following condition annexed:

"The condition of the above obligation is such  
 whereas the said John Halcomb is appointed  
 deputy sheriff of the said county, under the said  
 Thomas Flournoy, now if the said John Halcomb  
 shall well and truly execute the office of deputy  
 sheriff, and honestly, justly, and according to  
 law collect and pay all public taxes either in  
 money, tobacco, or other article made payable  
 and receivable in taxes by any law now in force,  
 or by any future law, as also all levies, officers  
 fees, executions and other monies, tobacco, or  
 other article collected by virtue of his said office  
 to such person and persons having a right to de-  
 mand and receive the same, within the time  
 prescribed by law, as also save harmless and in-

If there be  
 an order of re-  
 ference made  
 during the  
 pendency of  
 a suit, the a-  
 ward, in pur-  
 suance thereof  
 need not lie in  
 Court two  
 terms, as it is  
 not within  
 the act of As-  
 sembly, upon  
 awards.

What dama-  
 ges may be es-  
 timated by ar-  
 bitrators upon  
 a bond given  
 by the deputy  
 to indemnify  
 and save harm-  
 less the High  
 Sheriff.

"demnified



Halcomb  
vs.  
Flournoy.

"demitted the said Thomas Flournoy, from all  
"motions for judgments in any Court of record,  
"and from every action; or cause of action, that  
"the said Thomas Flournoy, his heirs, executors  
"and administrators may be subject to, by his said  
"office of sheriff for the county aforesaid, then  
"this obligation to be void or else to remain in  
"full force power and virtue."

Various orders of reference were made; and at  
the September Court 1798, the suit was dismissed  
as to Watts, and the arbitrators made their  
award as follows:

"Dr. John Halcomb, George Walker, Philemon  
Halcomb junior. William Watts and Joseph  
Scott junior.

To Thomas Flournoy.

1789 To paid on account of an ex-	}	125 14 8
Dec 2 ecution commonwealth against Thomas Flournoy, certis.		

1792 To amount of certificates	}	86 7 4
Oct. 11 paid the treasurer on account of execution commonwealth against P. Halcomb. Cts.		

1793 To paid Martin Smith for	}	8 14 6
June balance due by J. Halcomb 18 sheriff for the redemption of negroes sold by Richard Bibb Certificates.		

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Certificates. £ 220 : 16 : 5

1791 To paid treasurer on acct.	}	42 10 6
Dec. 2 of taxes for 1786.		

To paid clerk's Henrico, P.	}	0 13 0
Edward, and sheriff of same.		

1792 To paid Andrew Rey-	}	4 4
Jan. 8 nold,		

To paid William Cowan.	10
	Jan.

Jan 29 To paid an execution James Timley against T. Flournoy.	10 15	Halcomb vs. Flournoy
Oct. 11 To paid treasurer on account of execution commonwealth 1790. against P. Halcomb.	7 10 2	
Mar. 29, To paid an execution Thomas Watkins clerk of Chesterfield.	5 12 8½	
To paid an execution Maurice Langhorne against Thomas Flournoy.	2 13 10½	
1798 Specie	£ 83 19 2½	
Aug. 10. To interest on money advanced to this date, & damages sustained by the plaintiff to the date of the writ, rating certificates at 18/8.	150	
Amount of cert. bro't down.	220 16 5	

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£ 454 15 7½

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## C R E D I T.

1791. By amount of sales of three Dec. 2, negroes on execution, Flournoy vs Holcomb and others, dated Nov'r. 1st 1791, from Prince Edward court commissions deducted.	101 1 6
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By difference in amount of certificates 2/ in the £ } 22

Balance due T. Flournoy } 331 14 1½  
August 10th 1798.

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£ 454 15 7½

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We

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We certify, that agreeable to the annexed orders of the District Court of Prince Edward, We this day met at the house of Quin Morton, in the county of Charlotte, the plaintiff and defendant John Halcomb being present. We proceeded to examine the vouchers produced and make a statement as will appear from the foregoing account. It appearing to us, that the plaintiff hath been put to very great trouble by frequently travelling to the city of Richmond on account of the Commonwealths judgments against him for arrears of taxes and incurred considerable expence thereby. It also appears, that his negroes taken in execution to satisfy said judgments, were kept out of his possession and service at various times, from which he sustained losses. We have allowed interest on monies advanced, and rated the damages as will be seen in the debt. We find a balance of three hundred and thirty one pounds, fourteen shillings and one penny three farthings due to the plaintiff from the defendants, and which sum we award him with costs of suit given under our hands &c."

The District Court gave judgment, upon the day of the return of the award for the £ 331 14 1 $\frac{3}{4}$  awarded and costs. And the plaintiff agreed "to release ten pounds for so much paid William Cowan, and four pounds four shillings paid Andrew Reynold in the account aforesaid mentioned."

To this judgment Halcomb and the others obtained a writ of *superseas* from this Court.

RANDOLPH for the plaintiff. The court were premature in entering up judgment upon the award; which ought to have lain in court two terms, according to the express directions of the act of Assembly; for it is not shewn, that the plaintiff appeared and contested the award: Which would have altered the case.

The item of £ 150 contains matters not within the submission. For that was of all matters in difference

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ference between the parties in the suit; and, upon the trial, such matters would not have been permitted to go in evidence to the jury. They were no more than the ordinary cases, of expences incurred, and inconveniences sustained, by a security. But these were never yet thought, to be a subject of damages, for which a suit could be sustained. On the contrary, they are literally *damnum absque injuria*; and no action lies for them.

WICKHAM *contra*. *Mitchell vs Kelly* \* in this court, decided the first point; and proves, that an order of reference of this kind is not within the act of Assembly.

The £ 150 damages were justly allowed; because it was a bond to save harmless, and therefore the appellee had a right to insist on being completely indemnified; which could only be done, by making compensation for his necessary expences, and the inconveniences and losses which he had sustained, by the misconduct of the appellant. Besides arbitrators have more latitude than a court; and may decide according to equity.

RANDOLPH in reply. However reasonable the demand, yet not being the subject of an action, it would not have been permitted to go to the jury: Whose enquiry would have been confined, by the court, to the money paid and interest; which is the only compensation and measure of damages, which the law allows, in cases of this kind.

*Cur. adv. vult:*

ROANE Judge. Two objections are taken in this case. 1. That the award did not lie long enough in court, according to the act of 1792, but was immediately confirmed by the judgment of the court. 2. That the arbitrators, as appears by the report, allowed damages, for matters, not within the terms of the submission.

Upon

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\* 2. Call's Rep. 379.

*Halcomb  
vs  
Flounoy.*

Upon the first objection, it was observed by the appellees counsel, that it was decided in *Mitchell vs Kelly*, that the act of 1792 does not apply to orders of reference, of this kind, made during the progress of a suit, depending in court; nor, upon examination of the act, do I think it does.

As to the second objection, I observe, that one of the conditions of the bond is, to indemnify the high sheriff, from all motions, judgments &c. Now this condition, as to the indemnity, will certainly extend to all just expences sustained, by the appellee, in consequence of any such motion judgment &c. as well as to all actual losses, occasioned by the detention of his negroes &c. These expences and losses, which are actual, are capable of being ascertained, by computation: And, certainly, the party cannot be said to be indemnified, that is, kept harmless, without they are allowed him.

At the same time I agree, entirely, with the appellants counsel, that the arbitrators ought not to have taken into consideration, mere speculative damages, such as for trouble, anxiety &c. and that this would lead us into an imaginary and inexhaustible field.

The question then is, upon this distinction, how stands the report of the arbitrators?

The item in the account presents nothing to impeach the award. Interest on the money advanced was certainly proper; and damages sustained may justly be restricted, for any thing appearing to the contrary in the item, to such damages as might legally be awarded. We are not to hunt out such a sense, as that damages may be understood to destroy the award; which ought to be favourably construed.

I take this, to be merely a statement of the evidence, which appeared to the arbitrators; and it does not irresistably follow, that the damages were given on such part of the evidence as would not  
 "warrant

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Fournoy.

warrant it; that is to say, an indemnification for the personal trouble &c. of the appellee. It is a just maxim, that *what is useful shall not be vitiated by that which is not so*. But it is not expressly stated, that the damages were given for personal trouble &c. and, if given for expences and losses, as before mentioned, it is right.

My opinion is, that, before we overturn an award (in a case where justice seems fully attained,) it ought certainly to appear, that the award was founded on illegal grounds. But this does not clearly appear to have been the case, in the cause now before the court; and therefore I am for supporting the award, as what is relied upon, to impeach it, is merely a statement of the evidence, which appeared to the arbitrators. Upon these grounds I am of opinion, that the judgment ought to be affirmed.

CARRINGTON Judge. This was an action, founded in damages, for breach of a covenant. The arbitrators were judges of the parties own trust, to settle all matters in dispute between them; and it is a rule, that awards should always be construed liberally. I think the items, including the damages, stated, by them, were clearly within the submission. The award therefore, which, although not formal, is founded in strict justice,) ought to be supported. I am for affirming the judgment.

LYONS Judge. I concur with the other Judges, upon the first point made, by the appellants counsel; but differ from them on the other. There is reference to damages generally; but the principal and interest is the true measure of damages in law; and mere speculative injuries and conjectural inconveniences do not enter into the subject of damages, at all. The court never enquires how the party got the money with which he paid the debt; but merely how much he paid? And when he paid it? Therefore, these conjectural damages

being

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Plournoy.

being included, the award I think ought to be set aside; but there is a majority of the court for affirming the judgment; and consequently it must be affirmed.

Judgment Affirmed

GEORGE STEPHENS

against

JAMES COBUN.

The judgment of the board of commissioners, under the land law, is conclusive; and cannot be impeached.

THIS was an appeal from a decree of the High Court of Chancery. The bill states, that John Stephens, in the spring of 1767, settled himself and family on Cobun's creek, extending down the said creek below an *agreed* line, which was afterwards made, by the said John Stephens and Jonathan Cobun, so as to include 400 acres. That the said John Stephens built a house, and moved his family thither; clearing 10 acres, and raising a crop. That the said agreed line continued, as a boundary between Stephens and Cobun's until four years after, when Stephens died; during which time, Stephens lived on the land, and raised corn. That his widow lived on the said land 5 or 6 years afterwards, with his family; and then sold it to Jonathan Cobun, who sold to James Cobun the defendant. That the plaintiff was then an infant, left by his mother, and supported by the bounty of his friends. That he was still an infant, when the commissioners sat; and, having no property, had no money to assert his right against the defendant, who then had the land in possession. That one Henry Stephens did, indeed, inform the board, that the land belonged to the plaintiff, but, being poor and ignorant, he was unable to support the claim against the defendant; who

apprized

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surprized of it, brought forward the claim of Workman; who had tomahawked a few trees, as Cobun said, on the land before said Stephens had settled there: By which means, the defendant obtained a certificate for the land. That Workman never had a residence in the country, except as a hunter; and if he marked any trees, it was for convenience as a hunter. It therefore prays, that the defendant may convey; and that the plaintiff may have general relief.

The answer states, that John Stephens did *settle* on the land in the bill mentioned; and continued there, with his family, for some time: That both were wrongful; as Workman had previously improved and occupied the land; on which he had done work, as chopping and heaping brush; and that he had made some progress in building a house or cabin. But, going to remove his family thither, that said John Stephens intruded on the land and held him out. That the agreement of Stephens and Jonathan Cobun, as to the *boundary line*, could not affect Workman; who was the true owner, *if any could be at that early period, before legal rights were obtained.* That Jonathan Stephens bought of Cobun's widow, and afterwards of Workman. That John Stephens knew of Workman's right, and offered £ 3 for it. That matters lay thus, until the commissioners sat; when the defendant was cited before them, at the suit of the plaintiff, by Henry Stephens. That the claim was fully heard, and decided for the defendant. Denies any fraudulent application for the certificate, or that he bought of Workman, with a view to defraud the plaintiff. Says, that the defendant was threatened, by Lewis Rogers, with a suit founded on Workman's right; and therefore he bought it, for a horse, which cost the defendant £ 22.

Jonathan

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Jonathan Cobun says, that in 67 or 68, Jonathan Cobun senr. and John Stephens settled on Cobun's creek, and, after dividing the lands by an agreed line, the said John Stephens settled on that now in dispute. That each division was improved, but he does not know, which was the oldest. That Lewis Rogers forbid John Stephens to settle on the said land, as Rogers and another had improved it, and had planted corn; although the deponent never saw any. However, that he did see some trees, which had been deadened, and some appearance of brush heaps, and the foundation of a cabin, two or three logs high. But does not know, if the whole or only a part of it was John Stephens land. That he saw the letter T. B. on a honey locust in Jonathan Cobun's improvement, supposed to have been made by Thomas Banfield; who claimed the land and gave his right to Jonathan Cobun senior, previous to the division, between Jonathan Cobun and John Stephens. That the plaintiff and the defendant were present and consenting. That the plaintiff's mother gave bond to indemnify the defendant against the heirs of John Stephens; and the defendant was security thereto. That the plaintiff's mother was daughter of Jonathan Cobun, deceased.

Meredith says, that he had heard Workman say, he had sold his right to John Stephens senior, for a quantity of liquor.

Ramfay says, that he had heard Rogers say, that Workman had improved three places in a day; and that Workman lost his gun. Upon which, they went away; and, on their return, that Stephens and Cobun settled. After which Rogers expected to lose, and sold for a horse, which he said was better than nothing.

A fourth witness says, that he had heard Workman say, if he could find his gun he would go away, as he did not like the country. That he did not understand that he had improved. That

the

the land in dispute, is that, which was improved by Banfield.

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Cobun.

Scott says, that John Stephens and Jonathan Cobun senr. settled on the lands, and made a dividing line. That Stephens cleared 4 acres, and raised corn.

Evans says, that the plaintiffs mother was on the land; and that 4 acres were cleared.

Banfield says, that he lay two weeks on the land; but not with intent to settle it. That he never claimed or sold it. That there were some small improvements, as brush heaps, deadened trees, &c. there, at the time; but does not know who had made them.

Workman says, that he settled the lands. That there were brush heaps, and a house 3 or 4 logs high. That he planted corn; and began to clear a meadow. That he lost his gun and went away; leaving his crop in the care of Lewis Rogers. That he would have returned, but John Stephens, father of Geo: Stephens, had taken possession, and kept him out. That he sold his right to the said Rogers; which he would not have done, had he known of the commissioners sitting there. That some small time after he had left that country, the said Rogers alarmed him about the Pennsylvanians and their proclamation. That he never told John Sempson that he would not return. That he never said that the defendant was to pay him if he gained the suit; although he might have said that he was to pay the expence, he was at, in going to have depositions taken. That he never told Merrifield that he had given his right to John Stephens. That he never saw him. That Rogers told him that John Stephens had offered him £ 5 for the deponents right.

Lewis Rogers speaks to the same effect as Workman; and says, that he bought of Workman and sold to the defendant,

C.

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vs  
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C. Ratcliff says, that John Stephens drove a man off a piece of land as she heard; and that the said Stephens got on the land, in dispute.

William Haymond says, that he was one of the commissioners. That Henry Stevens, on behalf of the plaintiff, brought suit for the lands in dispute, which was decided in favor of Cobun because he had the eldest improvement, to wit, *Workman's*.

J. Ratcliff says, that he was present at the suit before the commissioners; and that it was decided in favor of Cobun; who had *Workman's* right:

C. Ratcliff further says, that the trees were deadened. That there was part of a small cabin before John Stevens took possession; but she knows not by whom it was put, further than that she heard Rogers say it was *Workman's*. That Rogers, in *Workman's* name, warned Stephens to go off the land, That Stephens refused, saying he had offered Rogers £ 3 for it. That she was present as a witness before the commissioners; who decided for Cobun.

Decker says, that, about the year 1765, Stephens, *Workman* and Lewis Rogers improved two tracts of land, as the deponent has heard; one for his father, the other for himself. That he planted corn on both places. That the deponent, his father, and the said *Workman* left the country; and that Rogers left it some time after. That in about two years after, old Cobun and John Stephens came and settled on the said land. That Stephens never bought *Workman's* right. That Rogers went off, on account of the Pennsylvania proclamation. That John Stevens claimed to a fence, but he does not know the agreed line. That he saw the corn planted by *Workman*.

There are amongst the papers in the record, a copy of the judgment of the commissioners; and a copy of Cobun's surveys.

The

The County Court decreed a conveyance to the plaintiff. The High Court of Chancery reversed the decree. 1. Because the plaintiffs ancestor had no title. 2. Because the judgment of the commissioners was final, notwithstanding the infancy of the plaintiff, as it had not been reversed by the General Court. Whereupon the plaintiff Stephens appealed to this Court.

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RANDOLPH for the appellant. Upon the principles of equity and the evidence in the cause, the case was clearly in the appellant originally. For the transitory possession of Workman, if indeed it was true he ever had it, cannot be admitted to have conferred any right, or, if it did, he parted with it to Stephens. Therefore, unless the judgment of the commissioners, has barred his claim, he was early entitled to a decree for the land. But, as he was an infant and his case not fully before the board of commissioners, their judgment ought not to preclude him.

CALL *contra*. The merits, as well as the law of the case, are in favour of the appellee. For it is established, beyond controversy, that Workman made the first settlement and improvement. Therefore Stephens was an intruder on his right; and the weight of testimony is, that he never sold to any person but Cobun. The judgment of the commissioners is decisive; for the law expressly declares that it shall be final. *Chanc. Rev.* 93. The appellant was plaintiff, by a person who acted as next friend, before the commissioners, and appears to have been fully heard. Therefore he ought to be barred by the judgment: For an infant plaintiff, when heard by his next friend, is much bound by the judgment, as a person of full age. Besides it does not appear what testimony was before the board; and, perhaps, much stronger evidence was adduced by Cobun on the merits, than appears in the present record. For, though, he has thought proper to adduce some

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testimony on the merits, he was not bound to do so; and therefore, if his testimony were defective, (which it is not,) yet that would not affect the case; because the judgment is conclusive, and cannot be impeached.

But, for another reason, the decree of the Chancellor is right; namely, that Coburn and Rogers are no parties to the present suit; for not having passed any deed for their title, and their rights having been drawn into controversy, they ought to have been made parties, *Buck vs Copland* &c. in this court. Which is the stronger in the present case, as their testimony is objected to on the ground of interest; and they ought certainly to be heard by answer or deposition.

*Cur: adv: vult:*

LYONS Judge. Delivered the resolution of the court, that the act of Assembly was conclusive; and that the decree was to be affirmed.

Decree Affirmed.

WALLACE

## WALLACE and wife

against

## TALIAFERRO and wife.

**THIS** was an appeal from a decree of the High Court of Chancery, where Taliaferro and wife brought a bill, for relief against Wallace and wife, stating, that William Rowley made his will the 18th of May 1774, and devised to Lettice Wishart and Catharine Taylor sundry slaves, together with the residue of his estate, subject to the payment of his debts and legacies. That he appointed their husbands John Wishart and Richard Taylor executors of his said will; and died before the 25th of September in that year. That the executors qualified; but John Wishart acted principally, and worked the slaves on the testators' lands. That, after the death of the said William Rowley, the said John Wishart made his will, to take effect on the day of        in the year 1774, and gave all his slaves to be equally divided between his two sons, William and Sydney, and his daughter, the plaintiff; but the enjoyment of the property was to be suspended, until his sons came of age. That Wishart died before the 25th of December 1774. That after the death of John Wishart, the slaves of Rowley were divided between the defendant Lettice and the said Catharine Taylor, according to the will of the said Rowley. That Lettice Wishart, after the death of the said John Wishart, intermarried with the defendant Michael Wallace; who took possession of all the slaves, and her estate, which were allotted to the said Lettice. The bill therefore prays for the plaintiffs' proportion of the slaves, and for general relief.

The answer of Michael Wallace denies that the slaves (except Lydia, who was claimed by his wife,

of W. R. survived to herself; and did not pass by the will of J. W.

**Construction** of the 4th section of the explanatory act of 1787, chap. IV.

W. R. made his will in May 1774, and devised to L. W. and C. T. sundry slaves, with the residue of his estate, subject to the payment of his debts & legacies; and appointed J. W. the husband of L. W. and R. T. the husband of C. T. executors. Who qualified as such. In August 1774, J. W. died, before any division of the estate of W. R. was made, and by his last will devised all his slaves to his daughter & his two sons. As J. W. was, at most, only possessed as executor, and not in right of his wife, her share of the

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wife, by title paramount) were ever in possession of John Wilhart; but says, that Lydia and her issue have been divided, by a decree of the Court of Appeals. States that Richard Taylor alone acted as executor. That the slaves are not mentioned in the will or inventory of Wilhart. That the debts and legacies were considerable; and that she has given up property to pay them.

The answer of Lettice Wallace, states, that she does not know that John Wilhart ever had possession of the slaves; and believes he had not.

The answer of William and Sidney Wilhart states, that they have relinquished to Wallace.

Davies a witness says, that he lived with Rowley, when he died on the 20th of May 1774: That Wilhart died about August 1774; but that during his life, the slaves were under his direction. That the legacies were not discharged, at the death of Wilhart, but the lands were sold by Taylor and wife and Wallace and wife to pay legacies, &c. That Wilhart took upon himself the active management of the estate. That the widow resided in the mansion house, and the servants waited on her as usual; but she did not controul the property. That there were about £3000 due the testator; that a good deal of money was collected; that it was not necessary to sell the residuary estate to pay the legacies; and that from conversation with Wilhart the deponent believes, he claimed the property devised to his wife.

Rowley a witness says, that Wilhart was never on the plantation, where he resided, after the death of Rowley the testator. Thinks however that Taylor was the acting executor, because he attended the appraisment.

The Court of Chancery was of opinion, "That by force of these words, in the act of the General Assembly, passed in the year 1727. *Where and slaves shall be bequeathed to any feme covert, the absolute right, property and interest of such*

" *slaves*

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slaves is hereby vested in, and shall accrue to, and be vested in the husband of such female covert, the right of the defendant Lettice Wallace to one moiety of the slaves bequeathed to her, then Lettice Wishart, and to Catharine Taylor, the wife of Richard Taylor, by William Rowley, which bequest is no less efficacious, than it would have been, if thereto, John Wishart, the former husband of the defendant Lettice Wallace, who was one of the executors of the said William Rowley, and in whose possession the said slaves appear to have been, and who, by a special assent, or other act, did not shew himself to have taken possession in character of executor, and not in character of the legataries husband, was perfectly transferred to the defendant Lettice, and consequently vested in the said John Wishart, and was subject to the bequest thereof, by him to his three children." Therefore that Court decreed the plaintiffs a third of the slaves which had been allotted the defendant Lettice upon the division of Rowley's estate.

From which decree Wallace and wife appealed to this Court.

RANDOLPH, for the appellant. Contended: 1. That the personal chattels of the wife, not reduced into possession during the coverture, survive to the wife, if she outlive the husband. 2. *Black. Com.* 433. 1. *Wms.* 378. 1. *Atk.* 459. *Co. Litt.* 351. *Y. Bac. abov.* 386.

2. That the slaves given to the wife and a stranger are, as to this purpose, personal chattels, and do not belong to the husband, if he dies before the wife, without having had possession of them, during the coverture.

The act of 1727 explains that of 1705: and was intended to let slaves remain real property, only in the two cases of descents and intails. In all other instances they were to be personal estate. Accordingly the first seven sections are all explanatory;



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natory; and particularly, the provision in the 6 §. that slaves shall not be forfeited, except in those cases, where lands and tenements would be subject to forfeiture, is decisive, that in the contemplation of the Legislature, they were personal estate; and, as such, would have been liable to forfeiture, without the provision. Therefore when the 4. Section declares, that they shall vest in the husband, the Legislature must be understood to mean, according to the nature of personal estate. This has been the constant course of decision in all the Courts of this Country, both before and since the revolution. *Stager vs Moseley*\* and *Bronaugh vs Cocke*† in the old General Court. And *Drummond vs Sneed*‡ and *Herd vs Upsbaw* in the late Court of Appeals, referred to by the Court in 1. *Wash.* 30. These decisions will be regarded as sacred; because they are the decisions of the Courts of this country, to which, slaves are peculiar; and which consequently, must have its own laws and usages concerning them. Those usages too, as serving to explain the public opinion on the subject, will be respected by the Court. *Downman vs Downman* 1. *Wash.* 26 *Granberry vs Granberry* 1. *Wash.* 246.

3. That Wishart was not in possession; and consequently having died before his wife, the slaves survived to her, as chattels undisposed of, by the husband,

It is doubtful, whether he ever was in possession at all; but, if he was, it was as executor. 3 *Bac. abr.* 488. *Wentw. off. ex.* 223. Indeed, as it appears that the legacies were not paid during his lifetime, he could not have taken possession in right of his wife; for it would have been a *devavit* in case of another person; and what he could not have

done

\* John Randolph's M. S. Reports,

† Ibid.

‡ Vid. The next case,

done in the case of another, he could not do in his own case. Besides, there must be an assent of the executor to the legacy, before the legatee can take possession; but there is nothing which shews, that even Withart, and much less that Taylor, the other executor, ever assented to this devise.

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**CALL contra.** It would be difficult to maintain, on any principle of fair reasoning, that slaves since the act of 1727, are to be considered as personal property in every instance, but those of descent and intail. The words of the law according to the plain import of them, do not appear to me, to admit of such interpretation. For the act of 1705, which declares them real property, is the *substratum*, and that of 1727 only operates as exceptions out of it. Otherwise it would have been easier to have repealed that of 1705 altogether, and to have incorporated those two provisions relative to descents and intails, into that of 1727: But, if, according to just construction, this entire reversal of the principle of the act of 1705 cannot be sustained, it would deserve to be very seriously considered, whether the decision of any Court would be paramount to the positive directions of an act of Assembly.

However, it is unnecessary to argue that point at present; because the decisions, referred to, establish no more, in their utmost latitude, than that slaves are to be considered as personal property; and whether, they be taken as real or personal property it will be equally true that by virtue of the first sentence in the 4th section of the act of 1727, they vested in, and belong to the husband, absolutely, and without any manner of qualification.

1. Because the words of the act are sufficient to produce that consequence.

For, by the first sentence of the 4th section, every interest of the wife is transferred to the husband. The words are, "that where any slave or slaves have been, or shall be conveyed, given,  
" or

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"or bequeathed, or have or shall descend to any  
" *feme covert*, the absolute right, property and  
" interest, of such slave or slaves; is hereby vested  
" and shall accrue to, and be vested in, the hus-  
" band of such *feme covert*." Which necessarily  
translates every interest of the wife into the hus-  
band; who, *ipso facto*, becomes complete owner  
of the whole interest, to the utter exclusion of the  
wife: And this whether the slaves be considered  
as real or personal estate. It is impossible by any  
other construction, to satisfy the words, *the abso-  
lute right property and interest of such slave or  
slaves, is hereby vested, and shall accrue to and be  
vested in, the husband of such feme covert*. Be-  
cause, if the whole right and property is vested in  
the husband, it must belong to him absolutely, and  
cannot enure to the wife. For *uno flatu* that  
it is given to the wife, it is, by operation of law,  
transferred to, and vested in the husband. So that  
nothing remains in the wife; and the husband  
may maintain an action in his own name to recover them.

This which is so plain upon the words of the  
first sentence, is rendered clearer still, by compari-  
son with the next; which requires actual possession  
in the case of a feme sole, who afterwards marries.  
A circumstance which plainly shews, that the Le-  
gislation contemplated a difference in the two ca-  
ses. That is to say, that the mere gift to a feme  
covert should transfer the estate to the husband;  
but that an actual possession should be necessary,  
during the coverture, in the case of a feme sole,  
who afterwards married. For unless a difference  
in the interest was intended, it will be extremely  
difficult to account for the difference in the lan-  
guage.

Therefore, although slaves should be considered  
as personal property, it will make no difference;  
for still the whole interest vested in, and belongs  
to the husband, without any possession. In the  
same manner, as if the act had said, that every

diamond'

diamond, given to the wife during the coverture should be vested in, and belong to the husband. Which, certainly, would so essentially transfer the property to the husband, that the wife surviving could have no claim to it.

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It is like the statute of the 27. Henry 8. relative to uses: Which transfers the possession to the use; and gives complete seisin to the grantee, without any act, to be done, on his part, to acquire it. So here the title is transferred to the husband, without his obtaining actual possession; and the only difference between them is, that the Act of Assembly transfers the title only, whereas the Act of Parliament transfers the possession: A much more difficult operation.

There could have been no difficulty in the case, if the plain words of the law had been attended to, instead of resorting to a system of artificial reasoning, founded on a supposed resemblance to things, to which it bears no analogy. That is to say, the rules with regard to courtesy and possession, in other cases of property belonging to the wife. For the whole interest being, *ipso facto*, transferred to the husband by act of law, he does not stand in need of seisin, or possession, to complete his title.

In this view of the case, it bears no resemblance to the case of courtesy in real, or possession in the use of personal property. Because seisin and possession constitute part of the right, in those uses; but, in the other, the gift and coverture only are requisite.

All which seems perfectly consistent, with what was said, by the court, in *Dade vs Alexander & Ash*. 30. For the doctrine, there laid down, does not seem to require, that the surviving husband should take administration in order to entitle him; but considers him entitled, by virtue of his marital right, independant of the necessity for taking administration. Which is not stated, by the court, as one of the ingredients of his title.

Perhaps

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Perhaps it will be asked how *Drummond v. Sneed* could have been decided upon the ground now taken. The answer is, that it might have been determined consistently with the doctrine contended for, several ways. 1. The life estate and the remainder might have been considered, as forming only one estate; and the life interest, as being a mere exception out of it. 2. The devise of the remainder, according to the spirit of the 10. section, might have been considered, as giving the absolute property; because there would be no more impropriety, in saying, that the remainder should vest in the husband, than that the whole thing should. For it was the law which would vest it in either instance; and it would be equally competent in both. 3. The court might have taken the statute by equity; and considering, that the Legislature, having given the slaves to the husband in other instances, probably intended to give remainders also, they might, in conformity to the Legislative will, have considered those cases as embraced within the equity of the act.

But whatever might have been the grounds of the decision in that case, neither that or any other case has ever decided, that the first sentence, of the 4. section, did not transfer the whole interest to the husband; and therefore the words of the act of Assembly, being plain and unequivocal, must prevail against any artificial reasoning, drawn from the rules of the common law. For, the Legislature having made an express provision for the case, the act of Assembly and not the precepts of the common law must give the rule.

However, so far from the case of *Drummond v. Sneed* being repugnant to the doctrine contended for, it seems rather to support it. Because it appears, from the statement of it, as if it must have been decided upon the principles of the first sentence of the 4. section. For the interest of the wife, in the remainder was adjudged to belong to the husband; which is consistent with the words of the act.

a. But

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2. But, perhaps under another point of view, if they be considered as personal property, they still belong to the husband. For, there are books, which seem to countenance the idea, that by the rules of the common law, the gift of personal things to the wife, during the coverture, vests them absolutely in the husband. 2. *Com. Dig.* 82. *Bumb.* 188. 1. *Roll. Rep.* 134. 1. *H. Black.* 109. 3. *Lev.* 403.

If this doctrine, be correct, then, this clause of the act only established two principles, which were rules of the common law before; and the decision, in *Drummond vs Sneed*, provided for the third case; namely, that of the remainder.

But the husband was in possession.

1. Upon the proofs in the cause. For some of the witnesses expressly state him to have been the active executor, and to have had the management of the slaves. Added to which Davies says, he understood him, as claiming the property devised; which was equivalent to an assent to take.

2. By inference of law, his possession, as executor, was a possession in his own right. Because, as he could not sue himself, the rights were merged, *Moor:* 54. *Rep. T. Finch.* 370.

That the debts and legacies were unpaid, makes no difference; 1. Because the merger was *sub modo* only, and contained an exception, as to creditor and legatees. 2. Because a fund greatly more than sufficient, was provided for the payment of them; and the witness says it was unnecessary to sell the slaves. So that taking possession of the devised estate, would not have been a *devastavit*, as the appellants counsel supposed; and, as there was no reason for preventing the execution of the possession, a Court of Equity will consider it as done.

This is the more especially true, as the husband had taken all the possession he could; for the law continued the slaves upon the testators lands until the

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The crop was finished; and a contrary doctrine would put it out of the power of a man, to make a provision for his family, according to the wealth, which he might suppose himself to be possessed of. Because, upon a similar pretence of debts and charges, years might elapse, before the devised estate would be considered, as having vested in actual possession.

The result of the whole is, that the husband and the other legatee were tenants in common of the devised slaves; and, of course, that the husband was completely entitled to the whole interest.

WICKHAM in reply. The first point made by the appellees counsel has long been considered as at rest. All the decisions have been contrary to the doctrine he contends for; and rightly so. For the object of the act of 1705, in making slaves real estate, was only to improve estates, and encourage agriculture. But it was found inconvenient in many respects; and therefore, the act of 1727 was made; which restores them to personality in most cases; and particularly in that now under consideration. The whole complexion of the first seven clauses announces this to have been the intention of the Legislature. They are to pass as personal property in conveyances; similar rules for their vesting are established; and they are subject to the rules of personal property, in the cases of forfeitures and executions. All which shew the intention of the Legislature, to turn them into personality; and the intention, and not the mere words of the statute, ought to prevail.

It is not credible, that the Legislature intended, that this kind of property should go neither as real or personal estate, according to the doctrine on the other side. Therefore Mr. Randolph's interpretation, of the first sentence of the 4. section, is correct; namely, that they are to be considered as vesting in the husband, according to the manner of personal estate. This seems to have been the principle adopted in *Drummond vs Sneed*; and in all

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all the cases before the old General Court. Which ought to be considered, as having fixed the law, on a basis much too firm to be shaken, at this distance of time, when so many estates are enjoyed under them. In short slaves are chattels real, and like other chattels real survive to the wife, if not disposed of by the husband during the coverture. This is the spirit of the law; this the true construction of the words; and finally, this is the idea, which has always been adhered to by the courts; and ought not now to be disturbed.

It is not true that personal things given to the wife, during the coverture, vest absolutely in the husband; so that, if he die without reducing them to possession, they will belong to his executor, and not to the wife, if she survive him. None of the cases cited afford the least semblance of such a doctrine, (for, as to that in *Roll*, the husband survived the wife; and 1. *H. Black*: was only the assertion of counsel,) except that in *Burd*. 188. And that is liable to two remarks; first, that it was the mere declaration of the party unsupported by evidence; secondly, that the defendant had received the husband's money from the wife; and therefore he was a trustee for the husband, and not for the wife. But opposed to this case, a great variety of decisions may be adduced. 1. *Vern*. 169. 2. *Bow*. 247. 2. *Wms*. 496. 2. *Vez*. 675. *Co. Litt*. 51.

Wishart was not in possession, in right of the devise. The testimony is equivocal, even as to his possession, as executor; but it was absolutely necessary, that he should have been possessed in character of legatee. Of which there is no proof. So that, if he was possessed at all, it was in character of executor, and then, upon his death, the right survived to the other executor. Who had a right to the slaves, for the purposes of the administration; and Wishart's representatives, having no right to the executorship, could not hold with

him.

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*et al.*  
*Exhibitors*

him. Besides the assent of the executors, to the legacy, was absolutely necessary, before any actual possession could be taken; and there is no proof that any such assent was ever given.

*Cur. adv. vult:*

ROANE Judge. This may truly be said, to be an important cause. The consequence of a decision either way, may be greater than I can foresee or estimate. Less experienced than my brethren in the laws of this country, and less acquainted with the former adjudications, I am less capable than they to calculate the probable effects, which will flow from our present decision. Their superior lights and more mature experience, better enables them to know what has been the understanding of this country, on the present subject; and what are the beacons, by which our countrymen have governed themselves, in regulating their transactions, relative to the point in question. Sincerely hoping, that the present decision may be the least injurious in its consequences, and the least productive of litigation, it gives me great pleasure to believe, that the opinion I now deliver, after the most mature deliberation, best answers that description; and best accords with the general understanding of our fellow citizens. My own observation on the subject is entirely corroborated, by the testimony of some of my brethren; in whose observation, talents and experience I have the highest confidence.

Yet let me not be supposed to take refuge for the support of my opinion, merely on the general understanding of the people, through a long series of time; my conclusions are derived from a deliberate consideration of the acts of Assembly themselves, taken conjunctly with the principles of common law; and from a consideration, how there have been decisions in this country affecting this case, so as to become fixed rules of property. For I have ever been of opinion, that such rules ought not, to be lightly departed from; and that they

they cannot be, without producing extensive evils and injustice.

The case has been rightly divided by the counsel into two general questions.

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1. Whether a possession of the slaves in dispute was necessary to have been in the father of the appellee Wilhelmina, who was the former husband of one of the appellants, in order to enable the appellees to recover? For, if not, there is an end of the case. But, if otherwise, then,

2. Whether such possession did actually exist in the present case or not?

The first of these two questions may again be considered, under two points of view; 1. Under our acts of Assembly, and the principles of the common law: 2. Under the decisions in this country.

The acts of Assembly embraced, by the first view, are those of 1705, and 1727.

The first of those acts declares, that slaves shall be held, taken and adjudged to be real estate, and not chattels; and shall descend to the heirs and widows of persons dying intestate, according to the manner and custom of lands of inheritance held in fee simple. It further goes to specify certain cases, in which slaves are assimilated to chattels; and which form an exception to the general clause first stated.

Next came the act of 1727, which is entitled an act to explain and amend the former. Before we go, particularly, into this act, it may be necessary to fix its character. If it were merely an explanatory act, a question might arise, how far a court could depart from the literal expression, as it was a Legislative construction of the words of a former statute; and the ancient doctrine was, that the court, on such a statute, was tied down to the letter? But the better opinion seems to be, that such statute may now receive even an equitable construction,

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construction, arising therefrom, on a general view of the whole act. 6. *Bac. abr.* 388. But this statute is also an amendatory statute. It changes the old statute, and introduces new principles; such as neither a judicial or Legislative construction could possibly have deduced from the former act. This is so evident to every body, that I need not cite particular examples. This statute of 1727 stands, then, on the same footing, as to its construction, with statutes in general; and the general rules for construing statutes properly apply to it. Some of these rules, which I shall presently have occasion to mention, authorize even an equitable construction of a statute, under certain circumstances; but I disclaim a resort to an equitable construction, in the present instance, as wholly unnecessary; and found my opinion, entirely, upon a just view of the legal construction of the whole act, under the influence of the rules of construction, before alluded to.

I will now read the title and the four first sections of the act of 1727; which are as follows:

“ *An act to explain and amend the act for declaring the Negro, Mulatto, and Indian Slaves within this Dominion, to be real estate; and part of one other act, intituled an act for the distribution of intestates estates, declaring widows rights to their deceased husbands estates, and for securing orphans estates.* ”

“ I. Whereas the act made in the fourth year of the reign of the late Queen Anne, declaring the Negro, Mulatto, and Indian Slaves, within this Dominion, to be real estate, hath been found by experience very beneficial for the preservation and improvement of estates in this Colony, yet many mischiefs have arisen, from the various constructions, and contrary judgments and opinions, which have been made and given thereupon, whereby many people have been involved in lawsuits and controversies, which are still liable to increase: For remedy whereof, and to the  
“ end

"and the said act may be fully and clearly explained and amended.

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"II. *Be it enacted, by the Lieutenant Governor, Council, and Burgesses, of this present General Assembly, and it is hereby enacted, by the authority of the same,* that the said act shall hereafter be construed, and the true intent and meaning thereof is hereby declared, to be, in the several cases herein after mentioned, as the same is herein after expressed and declared, and not otherwise, that is to say:

III. Whenever any person shall by bargain and sale, or gift, either with or without deed, or by his last will and testament in writing, or by any nuncupative will, bargain, sell, give, dispose, or bequeath, any slave or slaves; such bargain, sale, gift, or bequest, shall transfer the absolute property of such slave or slaves to such person or persons to whom the same shall be so sold, given, or bequeathed, in the same manner as if such slave or slaves were a chattel; and no remainder of any slave or slaves shall or may be limited by any deed, or the last will and testament in writing, of any person whatsoever, otherwise than the remainder of a chattel personal, by the rules of the common law, can or may be limited, except in the manner herein after mentioned and directed.

"IV. And that where any slave or slaves have been or shall be conveyed, given, or bequeathed, or have or shall descend to any feme covert, the absolute right, property and interest, of such slave or slaves, is hereby vested, and shall accrue to, and be vested in, the husband of such feme covert; and that where any feme sole is or shall be possessed of any slave or slaves, as of her own proper slave or slaves, the same shall accrue to, and be absolutely vested in, the husband of such feme, when she shall marry."

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The contrary constructions and opinions arising under, and the law suits produced by the act of 1705, are evils intended to be remedied, by the act. Two constructions of the 4th clause are now contended for, as relative to the present case. One which throws negroes into the class of chattels, and subject to the legal rules, doctrines and decisions upon that subject: The other, leaving them neither in the class of real or personal property in the respect in question; and consequently without any legal doctrines, or decisions, to govern them. By which of those constructions was the declared object of the Legislature, as above, to be best answered? Certainly by the former.

It seemed conceded in the argument, that if this case had stood singly upon the third clause, possession would then have been necessary in the husband, as falling within the general doctrine of Chattels personal; but that what are supposed to be the emphatical words of the fourth clause, could have been inserted for no purpose, if not to dispense with such possession.

My answer is, 1. That those emphatic words mean nothing more, than would have been inferred from the general words of the 3d clause. That if they did, yet there was a good reason for inserting them, to answer which they were inserted; and therefore, need not be construed, to dispense with possession; nor to infringe the doctrine of the common law.

On the first point, I will call to my aid two rules of construction: 1. That words and phrases whose meaning have been ascertained in a statute when used in a subsequent statute, are to be used in the same sense. 6. *Bac. abr.* 379; and clearly the same inference will follow, as between the clauses of the same statute. 2. That if a statute use a word, the meaning of which is well known at the common law, the word shall be used in the same sense in the statute. 6. *Bac. abr.* 383.

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In applying the first rule to the present case, I must observe that the same words *absolute property* are used in the third clause; which, standing singly, would confessedly not dispense with possession, is thereupon slaves stand precisely on the footing of chattels, by the common law. Those who may incline to ring the changes on the words *absolute right, property and interest*, in the fourth clause, are reminded, that none of those words are more emphatical, or extensive, than the words used in the third clause above mentioned; and that the word *interest* was most probably inserted therein, to comprehend limited rights of the wife; that is to say, those where she had not the absolute property.

In applying the second rule to this case, I will beg leave to read a passage from 2. *Black.* 433.

“ A sixth method of acquiring property in goods and chattels is by *marriage*; whereby those chattels, which belonged formerly to the wife, are by act of law vested in the husband, with the same degree of property and with the same powers, as the wife, when sole, had over them,

This depends entirely on the notion of an unity of person between the husband and wife; it being held that they are one person in law, so that the very being and existence of the woman is suspended during the coverture, or entirely merged or incorporated in that of the husband. And hence it follows, that whatever personal property belonged to the wife, before marriage, is by marriage absolutely vested in the husband. In a real estate, he only gains a title to the rents and profits during coverture; for that, depending upon feudal principles, remains entire to the wife after the death of her husband, or to her heirs, if she dies before him; unless, by the birth of a child, he becomes tenant for life by the curtesy. But, in chattel interests, the sole and absolute property vests in the husband, to be disposed of at his pleasure, if he refuses to take possession of them; for, unless he reduces

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reduces them to possession, by exercising some act of ownership upon them, no property vests in him, but they shall remain to the wife, or to her representatives, after the coverture is determined."

This passage I shall hereafter refer to, as giving the most modern and perspicuous explication of the doctrine on this subject; at present, I only wish it to be remarked, that the personal property of a wife is said to be absolutely vested in the husband, at the same instant, that it is declared, that if he does not reduce them into possession, during the coverture, they shall remain to the wife if she survives him. Here, then, is a decisive quotation from an eminent and accurate writer on the common law; shewing that the words, *absolute property in the husband*, are not to be construed as dispensing with possession in the case of chattels.

The third section of the act of 1727 has used the same words in the same sense; and the meaning of the same words in the third section, and in Blackstones treatise, under the influence of the two rules I have stated; both of which entirely accord with sound reason, and pointedly apply. Let us then hear no more of the stress laid upon what are called these emphatical words; especially, in opposition to the general spirit and purpose of the act.

But I have said, that if these words should ever be considered, as being more extensive than I suppose, yet there was a good reason for making them so, and consequently they ought to be restricted to answer that end, and not kept up in such enlarged sense, so, as in other respects to conflict with the other parts of the act, and the doctrines of the common law.

It will here be remarked, that slaves coming by descent are not declared to be, or to go as chattels by the third clause. They therefore are, or at least might have reasonably been supposed, by the Legislature, to remain real estate, as under the act of 1705; being such, the husband, but for the clause, which expressly extends to slaves coming by

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by descent &c. would only have the same limited interest, in such slaves, as descended to his wife during coverture, as he would have had in her lands; viz: the right of receiving their profits. It might therefore have been, to enlarge his interest in the slaves coming by descent, beyond what would have been the case, under the general words of the 3d clause, that these words absolute right &c. were put in, as being contra-distinguished, from the limited right, he would otherwise have had in such slaves.

These reasons are conclusive, with me, as to the construction of the act, admitting the words to be as extensive as is contended for, a reason is hereby assigned for it; and being thereby justified we ought there to stop; and not give them, as to other cases, a meaning, which they have not in the most approved treatises of the common law; which they have not in another clause of the same act; and which they cannot have without infringing the reason and symmetry of the common law, and introducing the uncertainty and litigation, which it is the declared object of the act to prevent.

Some stress may also be laid on the words, *heretofore vested &c.* The answer is, that these words relate to the whole act and not to this single clause; and that in its construction we are as much bound by the principles of the common law, adopted by the third clause of the act of Assembly, as by the very expressions of the act itself.

Wherefore, then, it is asked was this 4th clause put in, if in the present instance it is to have no greater effect, than the general provisions of the third clause would have had, without it? The answer is, 1. To take in the case of slaves descending, as above stated: 2. To declare for greater certainty, the law in this instance. The latter parts of both the third and fourth clauses, relative to remainders, and to the case of *femes sole* are al-

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so put in, for the latter reason, although every thing therein enacted, would unquestionably have followed independent of them, from the general position laid down in the 3d, clause.

It may be contended, that the third clause of the act only relates to the mode of transferring slaves, and declares that that mode, incident to chattels as contra-distinguished from real estate, shall govern in the case of slaves; but that its effect stops here, and does not attach to slaves (when transfered) all the principles which appertain to chattels. The answer is, that the provision concerning remainders (over and above the clear construction of the act,) proves the contrary. The provision extends to a principle, relative to personal chattels, posterior to, and independant of the act of transfer. It was intended to conform slaves, in this respect, to the doctrine of remainders, of personal chattels; it being then doubted, if not held, that such limitations after a particular estate were void.

I will here remark, that it has some weight, with me, that the fourth section is not by way of proviso, or exception. It does not, therefore restrain the operation of the third clause, but is additional to it; and is connected, with it, by the copulative *and*. And the just rule of construing one part of a statute by another, 6. *Bac: abr: 380*, holds with great force, where one part of an act is continued by, and connected with another, by copulative words. It is also a just rule of interpretation, that a statute, continuing another with some additional clauses, must be considered, as if the former had been recited therein. 6. *Bac: abr: 382*. I think this rule equally applies to a continuing of an additional clause of the same statute; and if so, the words of the third section, *in the same manner, as if such slave or slaves were a chattel*, are to be considered as kept up, and repeated in the fourth section.

I admit that it is also a rule of construction, that general words, in one clause of a statute, may be restrained by particular words, in a subsequent clause of the same statute. 6. *Bac: abr: 381.* But I contend that this restriction must clearly appear to have been intended; which, I have endeavoured to shew, is otherwise in the present case.

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Another rule of construction is, that where the provision of a statute is general, it is subject to the controul, and order of the common law; and that the best construction of a statute, in a doubtful case, is to construe it, as near to the rule and reason of the common law as may be, and by the course it observes in other cases; for it is not to be presumed, that the Legislature will make any alteration in the common law, except what is expressly declared. 6. *Bac: abr: 383, 384.*

It is also held, that such construction is to be put upon a statute, as may best answer the intention the makers had in view, 6. *Bac: abr: 384:* And, in the present case, the intention was to convert real property into personal in general, and not by throwing slaves out of both classes of property, as in the instance now contended for, to create a new species of property, and thereby promote lawsuits, which the act purports to do away. These consequences may also be taken into consideration, supposing the law merely doubtful on this subject, to govern the court in their construction of the statute. 6. *Bac: abr: 389.*

I will conclude with a rule of construction, which is, that the letter of an act of Parliament may be restrained, by an equitable construction, in some cases; in others enlarged; and in others taken contrary to the letter. 6. *Bac: abr: 386.* And if such be the power of a court, on a single clause of a statute standing independantly, it holds *a fortiori*, where such single clause is consistent with the body of the act; and where an equitable construction is not required, but only a just legal exposition of the whole statute taken collectively.

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These rules of construction, founded in good sense and sanctioned by high authority, are decisive, with me, as to the construction of the present law: They are so luminous, and apply, pointedly, to the case in question, that I forbear to make a more particular application of them.

But what good reason exists, for giving a husband survived his wife a right to slaves accruing to her during coverture, but of which he was never in possession, more than exists as to slaves in which a feme sole is entitled, who afterwards marries? The reason assigned, in the last case, why a surviving husband cannot recover them (except in the character of her administrator) is, that the only method he had to gain possession, during the coverture, was by suing in his wife's right; but as, after her death, he cannot, as husband, bring an action, in her right, therefore he can never, as such, recover the possession. 2. *Black:* 435 This reason is supposed equally to hold in the case of chattels accruing, during the coverture.

I have said, that the passage, before read, from Blackstone, contains the best view of the doctrine on this subject, when he speaks (in page 435) of personal chattels in possession, he says, the husband has the absolute right thereto, not only potentially, but in fact; leaving the inference extremely plain, indeed, that the husband, in case of *chose in action*, has the absolute (although only potential) right thereto. And understanding the word *absolute* in this sense, will at once answer some of the cases cited by Mr. Call on the subject. An attempt to cite them in the sense he contended it would be to impeach the best established principles of the law, and I confess the attempt surprises me. It is true, the passages relied on from *Blackstone* relates to chattels owned by the wife, at the time of the marriage; but there is no difference as to those accruing during the coverture. This is so plain a point, that I shall not cite authorities to shew it, except to refer to *1. Bac: abr:* 481

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who says, the law gives the husband an absolute power over any personal estate accruing to her, during coverture, by gift, devise, &c. thereby clearly conforming to the doctrine before stated from Blackstone.

I have thus done with my own view of the law relative to this subject. It is fit that some notice be taken of such decisions, as have occurred, in this country, affecting the case. On this subject, I beg to be excused, from saying much, as my experience does not reach far enough back, to know much of the decisions of the old General Court. I had supposed that no question would have been made of the competency of those decisions to fix rules of property in this country; as that Court, although not the dernier resort, was at least as much so, as the Court of Kings bench in England. How far the decisions of that Court, on subjects, other than that of fixing rules of property, will bind us it is not now necessary to say; but, if we reject such rules of property as have been fixed by that court, and under which our people have regulated their property through a long series of time, the mischief, which would ensue, is incalculable. I understand, that no decision one way, or the other, can be shown, to have ever taken place, on the very point now in question. The non existence of such a case, which must have occurred a thousand times in the space of 73 years, is a persuading circumstance, that the general opinion has always been, that slaves under the first part of the 4th clause, go as chattels, as they evidently do under the 3d clause; and as they have often been decided to do, under the latter part of the 4th, clause. The opinion of the General Court on such latter part, though not upon the very point now in question, is supposed to have given a principle, which has governed this case, and produced a general acquiescence under it. On no other ground can I possibly account for the non existence of a decision, on the very point now in question.

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In the case of *Steger vs Mosely* General Court October 1773, M. S. *Rep.* by *J. Randolph* 2<sup>nd</sup> ed page 232; the case under the last part of the 4<sup>th</sup> section, was, Devise to A. for life and afterwards to B. a feme, who married C. A dies living B. and C. and then B. dies living her husband, the slaves having never been reduced into possession: The question was, whether they vest in the husband, or go to the heir of the wife, and without argument, (as often before been argued,) determined they go to the husband. Hence to be concluded, that, notwithstanding the 4<sup>th</sup> section of the act of 1727, yet negroes vest in the husband, as a chattel only; if husband survives they vest in him as administrator of his wife (not being reduced in possession,) *Squib vs Wynn*, 1. *Wms.* 378 and, if she survives, they go to her, or her representatives. And in *Bronaugh vs Cocke* and *Smyth vs Lucas* (same reports) the law is said to be settled.

As the husband was not possessed of the slaves in this case of *Steger vs Moseley*, and so did not entitle himself, under the words of the 4<sup>th</sup> clause, if they were real property and not chattels, they would have descended to his wife's heirs. But this was adjudged otherwise; which could not have been, on any other ground, than that they were personal estate, under the third clause of the same act. This principle is supposed to be the one, under which the cases of *Drummond vs Sneed* *Hoard vs Upsaw* and *Dade vs Alexander* 1. *Wash.* have been decided; and this principle of slaves being personal estate, under the act of 1727, although established in cases depending on a different part of the 4<sup>th</sup> clause, may justly be deemed to operate in the present case; at least as having by analogy, furnished a rule of property, in cases like the present,

As to the rectitude of the decision in those cases of *Steger vs Moseley*, *Drummond vs Sneed* &c. I

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have not formed any opinion, except so far as the construction of the third clause is involved. It is sufficient to induce me to conform thereto, that they have been supposed universally to settle the law upon the subject, and have become a fixed rule of property.

I have now done with the first general question, and conclude that possession was necessary to have been in the father of the appellant Wilhelmina, to enable her to recover; and whether such possession did exist? remains now to be enquired into.

On this point I am clearly of opinion, from a consideration of the testimony, that if Wishart ever was in possession, at all, it was merely as a co-executor. The testimony is very full, to show the other executor to have been the acting person, and consequently to be in possession of the estate; and very slight, as it respects the actual possession of Mr. Wishart. But possession as executor, is not sufficient. Possession in his character as husband, and in right of his wife is indispensable. Such possession, if he were a different person from the executor, could not legally be without the executors assent; but the law is the same where both characters are united in the same person. In that case an assent or election to take as devisee must be expressed or clearly implied. Otherwise his possession will be considered, as in his character of executor, according to the authority cited by Mr. Randolph: and this general doctrine holds with greater force, under our act of Assembly; by which such possession could not legally have been taken, until the end of the year.

For these reasons I think the decree in the present case, is erroneous.

**FLEMING** Judge. There are two questions in this cause; one of law, and the other of fact. The question of law is, whether, by virtue of the act of 1727, the slaves were so vested in Mr. Wish-

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en or bequeathed, in the same manner, as if such slave or slaves *were a chattel*; and no remainder of any slave or slaves, shall or may be, limited by any deed, or the last will and testament in writing of any person whatsoever, otherwise than the remainder of *a chattel personal*, by the rules of the common law, can or may be limited, except in the manner herein after mentioned and directed."

This clause clearly renders them personal, as the forms of conveyances; and the 4th section following, immediately afterwards, provides that where any slave or slaves, have been, or shall be conveyed given or bequeathed, or have or shall, descend to any feme covert, the absolute right property and interest, of and in such slave or slaves, is hereby vested in the husband of such feme covert; and that where any feme sole is, or shall be possessed of any slave or slaves, as of her own proper slave or slaves, the same shall accrue to, and be absolutely vested in the husband of such feme, when she shall marry." Which makes a further alteration of the property from real to personal, by essentially changing the ownership, where the property has actually come to possession (thereby preventing many of the disputes arising from the notion of their being real property, under the former act:) and where it was not, by giving the husband an inchoate right, which he may enforce in case he survives, as it had been doubted under the former act, whether he had any right at all. But to complete the scheme of alteration, infants are in the next section, enabled to dispose of slaves by will, at the age of eighteen. Thus declaring them to be personal estate, in almost every instance, that could be named, but descents, entails and dower. By this string of changes, the law instead of declaring that they should be considered as real estate, (except in certain enumerated cases) may now more properly be said, to have, in effect, declared, that they



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they should be considered as personal property in all cases, except certain enumerated instances.

This idea receives considerable illustration from the following circumstance, that the Legislature in pursuit of their great object of preserving and improving estates, in an after clause of the statute allow a person by deed or will, to annex slaves and their increase, to lands and tenements in fee tail. A provision which would have been unnecessary if they were to be considered as real estate altogether; and which serves to shew, that, in the Legislative belief, they were, by virtue of the preceding clauses, restored to their pristine status of personal property.

Taking them, to be personal property then, and the consequence is, that, by a fixed rule of law, in order to entitle the husband to dispose of them by his will, he must reduce them into possession.

And this leads me to the second question :

There is some clashing in the testimony, relative to the part, which Wishart took in the management of the estate; but the account, most favorable to the claim of the appellee, only amounts to this, that he qualified as one of the executors in June, in a bad state of health; that he occasionally visited the plantations; was present, at the appraisal of the estate; and died in August following, without having ever been heard to claim the legacy, or taking the least notice of it, in his will written after the death of Rowley. Which, it amounted to a possession at all, was a possession as executor, and not in the character of legatee. For the bequest was of an undivided moiety of four hundred and six slaves, residing on different plantations, and of which no division had ever been made; nor could well have been, as by law they were to remain on the plantations, to which they respectively belonged, until the last day of December, for the purpose of finishing the crops.

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I am consequently of opinion that there was no offence; but that the slaves survived to the wife; and therefore that the decree of the High Court of Chancery ought to be reversed.

**CARRINGTON Judge.** The Court is now called upon to decide a question, which I did not expect to have heard discussed, at this time of day; as I had conceived, that the operation of the Acts of Assembly, relative thereto, had long since been understood, acknowledged, and acquiesced in.

It will not be necessary for me to enter, again, into a critical review and examination of all the different laws upon the subject, as that task has already been performed, with great accuracy and ability by the two judges, who preceded me; and therefore it will be sufficient for me to declare my entire approbation of the interpretation, which they have put upon the laws; and that I perfectly concur with them in opinion, that the true effect of the statutes is, to render slaves personal property, except in those cases, which are particularly enumerated.

But it is a rule of the common law, that although personal chattels aliened to the wife shall go to the husband, yet in order to perfect his right, and complete his title, he must reduce them into possession. 2. *Black. Com.* 433. It follows therefore, that it was indispensably necessary, that Wislart could have reduced them into possession, or the right survived to the wife, and this has hitherto, far as I am informed, been the course of opinion, throughout the state.

But it is said, that the case of a wife surviving her husband, not in possession, has never before been decided, and therefore that it is a new case. If it be true, that there has been no former decision, it can only be accounted for, upon the ground, that the question was considered as so well settled and understood, by the people, that nobody has

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ever thought it worth while, to stir it: And am not much disposed to indulge a construction which would put all to sea again, and might disturb the titles of thousands.

The principles, however, have been shewn, have been substantially decided in several cases in the General Court, under the former Government; and, notwithstanding the authority of these decisions has been questioned, yet considering that they are founded in a just and reasonable construction of the act; that they were made in perfect conformity with the public opinion; and have ever since been regarded as rules of property, I certainly consider them as entitled to so much respect, as not to be departed from in the present case; although I do not consider all the decisions, of that court, as binding upon this.

My opinion therefore is, that it was necessary for the appellee to have shewn possession in Wishart; and he himself will, I imagine, hardly be disposed to find fault with me for it, as he appears to have been of the same opinion himself. For the whole scope of the amended bill goes to shew, an assent to the legacy; and by that means to establish, if possible, a possession in the husband. This too appears to have been Wishart's own idea; as he did not attempt to devise them, and every body, who had any connection with the estate after him, seems to have thought the same way, until the present suit was brought, twenty one years after the transaction. It is therefore better to stop the controversy, and not attempt to move quiet things.

The Chancellor, however, has assumed, in his decree, that Wishart was in possession. An important fact, if true; and therefore necessary to be inquired into. But what was the possession of which he speaks? At most, (and even that is not free from doubt,) he was only possessed as executor. For the testator died between March and December, and by the law, the slaves were to remain

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main on the lands, until the 25th of December, for the purpose of finishing the crop, until which time, the estate could not well be divided; and, in point of fact, it never was divided in Wisbart's lifetime. So that, if he had any possession at all, it was in his character of executor, and not as owner.

Upon the whole, I think the decree is erroneous, and must be reversed.

LYONS Judge. In determining the present case, it does not appear, to me, to be important, whether slaves, since the year 1727, are to be considered as real or personal estate. For, in either case, the words of the act of Assembly will, in my opinion, transfer the right to the husband.

The case is the first of the kind, which I recollect; and, as far as my knowledge extends, the question has never been decided here before. It is therefore open to free discussion, and I am sorry to differ in opinion, from my brethren, concerning it. But it is my duty to deliver the opinion I have formed, whether that opinion be right or wrong.

The husband appears to me to have been the principal object of the Legislative care throughout the act of 1727: And an absolute transfer to him, of the wife's interest, in cases of this kind, seems to have been particularly contemplated by the fourth section. That is to say, the object of the act was to vest the title exclusively in the husband, without leaving any remnant of right in the wife.

The question therefore, seems to be, whether the Legislature, intending to vest the title in the husband immediately, and without regard to the rules of the common law, could do so? Or were bound to observe those rules against their own inclination, and what they supposed would be profitable to the country?

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There can be no difficulty, I presume, in answering these questions; because all must agree, that, if the Legislature could transfer, at all (which will scarcely be denied) they might do it absolutely, or conditionally, and in whatever manner they thought proper. So that it is merely a question of intention; and, upon that, I perceive no difficulty.

In deciding the cause, it may not be unimportant to observe, that the common law was as well known in the year 1727, the time of passing the explanatory act, as at this day. The Legislature knew full well the condition, upon which a husband obtained an absolute right to the wife's chattels. They knew, that actual possession, during the coverture, was necessary to vest the right in him. That, without it, the chattels survived to the wife, if she outlived him; unless he had assigned them, for a valuable consideration, during the coverture: And that, if he survived her, he could only take them in character of administrator.

Possessed of this knowledge, the Legislature seem to have been disposed to abrogate the rules of the common law altogether, with regard to slaves; and to establish a new system concerning them. So that although possession was before essential, in order to vest the property in the husband, it was, in future, to become unnecessary; and the interest was to be transferred to him, by operation of law, without it.

A few observations will evince this:

The professed intention of both the acts, upon this subject, that is to say, those of 1705 and 1727, was the settlement, and preservation of estates, by uniting slaves and lands in a common course of descents; so that the heir might have the benefit of the labour of the slaves for the improvement of the lands.

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That this was the intention of the Legislature, is proved, not only by the preambles to the statutes, but by the 11th section of the act of 1727; which recites the true design and policy of the former law to have been, to preserve slaves for the use and benefit of the persons, to whom lands and tenements should descend, be given, or devised, for the better improvement thereof; and that the same could not be done, according to the custom and method of improving estates in this country, without slaves. This section embraces, almost in terms, the very observations, which I have been making; and to my mind, establishes, very clearly, that the object of the Legislature was such as I have described it.

This being the principle, on which they meant to legislate, it naturally occurred, that as the lands generally belonged to the husband, and not to the wife, the object would be best attained, by transferring the title in the slaves to the husband, so that in case of the premature death of the husband, the proprietor of the lands might be enabled to cultivate them to advantage; which was thought of more importance, than preserving occasional rights of the wife, arising from accidental causes. Hence the predilection for the interest of the husband beyond that of the wife.

Thus disposed, the Legislature passed the fourth section of the act of 1727, not in corroboration of the rules of the common law, but in express abrogation of them.

It declares that, "Where any slave or slaves, have been or shall be conveyed, given or bequeathed, or have or shall descend to any feme covert, the absolute right, property and interest of such slave or slaves, is hereby vested, and shall accrue to, and be vested in, the husband of such feme covert."

This clause professes to transfer the title and interest, in the slaves, to the husband, without condition

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condition or reservation of any kind; and therefore if the Legislature had both the inclination and the power to make such a transfer, they certainly have effected it, by the extensive terms, which they have used. For the language is express, that the absolute *right, property and interest* shall be vested in the husband: that is to say, it shall belong to him, free from all conditions and restraints. For if the right, property, and interest is vested in him, he must be the complete and exclusive owner.

But it is said that only the common law rights were given, or rather revived by the act. This however seems to me, to narrow the construction more, than the plain, positive words of the law will admit of, and would render the act useless in many instances. For if the common law rights only were intended, a great proportion of the minute provisions and multiplied details of the act would have been unnecessary. Because, it would have been much easier to have declared them personal estate, at once, with the exception of descents, entails, and dower; and to have left it in all other respects subject to the operation of the common law, without the aid of statutory regulations; the only object of which would be to enact the provisions, which the common law would have made without. Especially as, by this means the property would have been liable to known rules, and would not have been perplexed with the difficulties and intricacies; which might arise in the construction of a string of statutory provisions.

It appears to me therefore, that the intention of the Legislature cannot be mistaken: It must have been to enlarge the rights of the husband; to put him in a better situation than he was at common law; and to transfer at the title of the wife to him immediately, and without regard to possession or survivorship. A provision calculated to put an end to all disputes between the survivor and the executors relative to the possession, at the same

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time, that it comported with the preference shewn, for the interest of the husband, throughout the act. A preference which ought to be considered in construing the law; because no rule is better settled, than that the general intention of the Legislature ought to be observed. I conclude therefore, that the makers of the act intended, that the words, *right, property and interest* should be understood according to their full and natural import.

But when all the right and interest of the wife is transferred to the husband, by plain and positive words, what remains to survive to the wife? To contend that she will take the slaves by survivorship, appears to me to be saying, that the rights are transferred out of her, and remains in her, at one and the same time. Which would be absurd and impossible.

I said that the sentence was clear; and in my mind, no difficulty can arise upon it: Ask a plain man the meaning of the words, *right, property and interest*, in any thing? The answer would be, the complete title to the thing, without condition, reservation or restraint. Ask a lawyer, what those words would mean in a deed, or will? The answer would be, that they conveyed an unconditional estate. Why then should a more limited construction, of them, take place in the exposition of a statute? I can see no reason for it, and therefore am not disposed to make a distinction.

Either the estate is vested in the husband by the words of the act, or it is not. If it is, how can it be divested, but by his own deed? And if it is not, what is to be done with the words of the statute? Their operation is destroyed, and they are reduced to mere dead letters.

To obviate this however, a construction was attempted, at the bar, to read the statute distributively; and as the gentleman said, according to the nature of the subject. That is to say, that the word *right*



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Tallaferr  
~~Wallace~~

~~Right~~ should be to the husband as husband, and *property and interest* should be to him as husband according to the common law; although the word common law is not once mentioned in the whole section. This may do credit to the ingenuity of counsel, but can hardly be considered as tenable by any person, who attentively peruses the statute. For not only, is the supplement unnatural, but it breaks the text; and therefore ought to be rejected. Besides the words of the act vest the title in the husband absolutely, and without reference to any thing else. Of course there is no occasion for the supplement; which is altogether, calculated to defeat the general object of the law.

Besides what is there to lead to this supplement? Suppose instead of saying they should be vested in the husband, the act had said they should be vested in the children or a stranger, would any body think of saying, in that case, that the *right*, to the children or stranger, should be to them as children or stranger; and that the *property and interest* should be to them, as children or stranger according to the common law? And if any body were to say so, what would he mean by it? Certainly no more, than that the right would be to them as children or stranger, and that the property and interest would go to them in the same manner. For the expressions would be synonymous, and the addition of the words "according to the common law," would create no distinction.

To conclude my observations upon the words of the clause.

The statute has said in plain and distinct terms, that the absolute right should be vested in the husband as a substantive individual character, and not as a person cloathed with any particular qualities or rights, at common law, but that his title should grow out of the Legislative expression itself. And can I, as a judge, disappoint this declaration of the Legislative will, and lay it under restrictions and qualifications, which the Legislature themselves

self has not thought proper to annex to it? I can only say, that I doubt my authority to do so; and that as the expression is plain, I think it ought to be adhered to; having no idea, that it is in the power of the Court, to reject the force of plain words in a statute. For the maxim is, that where there is no ambiguity in the words, there no exposition, contrary to the express words ought to be made.

Wallace  
or  
Taliaferro

From what has been said, it is evident, that it is wholly immaterial, as before observed, whether slaves be considered as real property in general, with certain exceptions of a personal nature, or as personal property in general, with certain exceptions of a real nature. For either way, the words of the act are peremptory; and vest the title in the husband.

It was said, by Mr. Wickham, however, that if this construction prevailed, a difficulty would follow, as slaves would be transmitted neither as real or personal estate; and therefore would have no rules to regulate the succession to them. But I see not the supposed inconvenience; for the succession in all other instances is regulated according to the real or personal quality, which they assume; and with respect to the cases enumerated in this section, the act itself regulates the disposition, and declares the person who is to take, in conformity to the avowed object of the Legislature.

As to the case of *Drummond vs Sneed*, it was a question of a different kind, arising upon another part of the clause, not well penned, and which, from the words, *as of her own proper slave or slaves*, looks as if it had been introduced merely to prevent the dower slaves of a wife, from being transferred to the second husband.

I had no difficulty in that case; for I thought the husband entitled several ways. For instance, as the object was merely to prevent the transfer of the dower slaves, I thought the word *possessed* might

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might be construed *entitled*; and then it would be in the same situation with the provisions of the first sentence. Or, if that would not do, that the possession of the tenant for life might be considered as the possession of him in remainder; and then the literal expression of the act would be satisfied. By both of which modes, all the parts of the section would be made to harmonize together; and the object of the Legislature would be attained. The judges, however, differed in opinion concerning the case. Some of them thought, that as the wife was not possessed during the coverture, the husband had no right under the act, or at common law. Others thought he had a common law right surviving to him: For myself, as I thought he was clearly entitled some way, it was matter of indifference to me, whether it was held that he had the right under the statute or at common law, provided it was held that he had it all. Therefore I concurred in the certificate, that the decree of the County Court should be affirmed; but I did not consider the present question, as having been decided at that time. On the contrary I thought it still open; and reserved for future discussion.

Of course I cannot agree, that that case forms a precedent for this.

The view, which I have taken, of the subject renders it unnecessary to consider, the other points made in the cause by the counsel for the appellees; because, according to my opinion, the Legislature of Assembly vested all the right, property and interest of the wife in the husband absolutely; and in the same manner, as if they had been devised to him immediately.

Of course I think, that, by virtue of the devise to his wife, the testator John Wishart was entitled to a moiety of the slaves, and that they passed by his will to the plaintiff Wilhelmina and her two brothers. Therefore, I am for affirming the decree.

PENDLETON

**PENDLETON** President. It is clear that slaves were considered as personal estate till 1705; when an act was made declaring them real estate and *not chattels*. Cases however, are put, as exceptions, in which the converse is to be the rule; that is to say, in which they shall be deemed chattels and not real estate, or in other words, that they shall return to their original nature.

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No dispute arose, that I know of, on any of these exceptions: But upon the 6th section doubts were entertained, whether it was confined to mere sales? or was extended to other alienations, by deed or will, or by marriage, an alienation of all the wifes personal property?

The words are, "provided also, that no person selling or alienating any such slave shall be obliged to cause such alienation to be recorded, as is required by law to be done upon the alienation of other real estate; but that the said sale, or alienation, may be made in the same manner as might have been done before the making of this act."

Had this clause any other meaning than to dispense with recording sales? If confined to that, it would have made it still necessary on a purchase of slaves to have had a deed, in writing, indented and sealed; but the latter part of the clause restored them to the mode of transferring chattels. So that payment of money, and transmutation of possession, sufficed the property without any writing.

This however occasioned the various disputes, which produced the explanatory act of 1727.

Altho' the rules of construction, allow us to reject one word, supply others, or transpose them so as to make the act consist with the design of the Legislature, yet it is said that mere explanatory statutes cannot be explained. Why? Is not the explained will of the Legislature to be pursued, as much as

their -

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their original will, although terms may be used which might import a contrary will?

I proceed to shew, that it was the intention of the act of 1727, that in the case of these alienations by marriage, or otherwise, slaves should be considered as chattels; and the husband be vested with the same interest (neither more or less) as his wife's slaves, as in her personal estate. Let it be remembered, that the Legislature are explaining the 6th section of the act of 1705, where it is declared that alienations shall be made in the same manner, as before that act. The 3d section is explicit, that in the case of sales or gifts with or without, deed, or by will, written or nuncupative, the absolute property should pass: But here in the same manner as a chattel.

Having thus, in the 3d section, declared the intention to restore slaves to their personal nature in those kinds of alienations, they proceed, in the 4th section, to the other kind by marriage; and although they do not repeat the words, *in the same manner as if such slaves were chattels*, probably thinking it unnecessary as they had already declared the principle, yet I will read the clause with those words interposed, in each case of feme covert and sole.

It will then stand thus “and that where a  
“ slave or slaves, have been or shall be conveyed  
“ given or bequeathed, or have or shall descend  
“ to any feme covert, the absolute right, property  
“ and interest, of such slave or slaves, is hereby  
“ vested, and shall accrue to, and be vested in,  
“ the husband of such feme covert, *in the same manner,*  
“ *as if such slaves were chattels*; and that  
“ where any feme sole is or shall be possessed of  
“ a slave or slaves, as of her own proper slave  
“ or slaves, the same shall accrue to, and be absolutely  
“ vested in, the husband of such feme, when  
“ she shall marry, *in the same manner, as if such*  
“ *slaves were chattels.*”

Which

Which removes all difficulty and will give meaning to those imperious words *absolutely vest*; that is, in contra-distinction to the limited interest which the husband has in the wife's real estate.

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The doubts which gave rise to the several cases *Wild, Elliot vs Washington, Southall vs Lucas, and Steger vs Mosely*, respected remainders of lives, which vested an interest transmissible in the wife during her coverture, but as there was no right to the possession, as the tenant for life survived the wife, the husbands after the death of the wives, claimed the slaves. The great objection to this claim, under this clause, was, that the property was to vest in the husband of a feme sole, at the time the title commenced, in such slaves, of which the wife was possessed at the time of the marriage, and this occasioned great difficulty. The clause in both parts, viewed as applicable to every supposable case, was easily soluble, by the principle, that wives were, in these instances to be considered as feme sole, making the marital rights of the husband the same in both: And this principle, I ever understood to be established, by the Court; and have considered it, as a fixed rule of property tending to quiet disputes.

But it is said the case of the wife surviving, and the husband not in possession, has never been decided and is a new case open for discussion on the point. Does any gentleman suppose this a new case, a fact? and that Mrs. Wishart was the first feme, who survived her husband, with her slaves in this predicament, because Mr. Taliaferro is the first, who has brought on the question for discussion? I believe the reason of there being no precedent is, that it was never doubted, that if the husband was not in possession, and the wife survived, the right was hers: And that in both the cases mentioned in the clause; for there is no difference.

Yet there is no direct decision on the point; It is collaterally decided however, in *Harrison d wife vs Valentins*. Mrs. Harrison, when sole

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sole was entitled to slaves which then lived with her mother; who, upon one of them, a woman misbehaving, sold her to Valentine, just before the daughter married. Harrison some years after the marriage, brought detinue, in the names of himself and wife, to recover the woman and her children from Valentine; who pleaded the act's limitations. More than five years had elapsed from the marriage but Mrs Harrison was an infant at the sale, and the suit was within time, after her coming of age. It was insisted for Valentine, that the act vested the right in the husband on his marriage; that he had improperly joined the wife, and that her infancy did not prevent his being barred. It was answered that the act only vested it as a chattel: That it was still the wife's personal interest which would survive to her if not reduced into possession during the coverture, and therefore that she was properly made a party, and that the true question was whether she was barred. The Court was of opinion in favor of the plaintiffs, and gave judgment against Valentine, deciding in fact, that the right would survive to the wife, if not reduced to possession in the husband's life time: The very case now before the Court.

I believe there is no instance of a husband suing, under either part of this clause, in his own name, for his wife's slaves, without joining her, except *Bronaugh vs Cocke*. And there the omission was made an objection.

But it is said, that there is no decision on the case, of slaves coming to a feme when covert. I recollect none, unless *Jones vs Shield* was such; which I do not remember distinctly. I know, that Jones claimed under the first husband against Shield the second husband; but failed here as well as in England. This case happened, before 1727; which might make a difference in the minds of some; although none in mine. Because I think the 6th

section,

session, of the act of 1705, puts the case on the same footing, as the act of 1727.

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Taliaferro.



A doubt was stated whether the decisions of the old General Court were authority; since although it was our Supreme Court, yet an appeal lay to the King in council. I would ask the gentleman, if it was ever objected to the authority of the decisions in Westminster Hall, that an appeal lay to the Lords? Where there was an appeal, and the sentence changed, the opinion of the Lords gave the rule; but in other instances that of the courts did. Probably some such idea, as the present, produced the cases of *Drummond vs Sneed* and *Haard vs Upsbaw*, to discover if the Revolution had produced any change in the legal sentiment. Fortunately, for the peace of the country, the experiment failed; and the point was left at rest. I imagine some young gentlemen of the bar, not old enough to know the practice of the country, nor acquainted with the former decisions, advised this suit, on reading the clause, and being impressed with the force of the strong expressions.

As to the practice, I can truly say, that in my long experience, I do not recollect an instance, where the slaves of a feme covert, or sole, when the right came to her, if they were not taken possession of by the husband, during the coverture, and she survived, were not yielded to her. We find that even the Chancellor, whose opposition to the old decisions is well known, considering the principal to be settled, that slaves vested only as personal estate, has founded his decree upon *Wishart's* possession. In which, however, I think he is mistaken. The contradiction in the testimony, is about an immaterial fact. Some say, that *Taylor* was the principal acting executor, and that *Wishart* acted but little: And others that *Wishart* was the principal acting executor. There is no doubt, but both acted as executors; and nei-

ther



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ther of them had any other possession, than, as executors.

But all this would be a fruitless enquiry, if Mr. Call had been right in his opinion, that in case "of a legacy of a personal chattel to a feme covert, the right is immediately vested in the husband, whether he gets possession of it or not." A position so contrary to every idea I had possessed on the subject, that it surprised me. On revising his cases, I do not discover the smallest reason to doubt, but that they prove a contrary doctrine. They lay down the general position, that such a legacy devised to the wife vests in the husband; but immediately explain how it vests; that is, subject to the conditions of his reducing it into possession or making a disposition thereof, in his lifetime, or surviving his wife; otherwise that it will survive to the wife.

Upon the whole, I am of opinion, that the right, to the slaves, survived to the wife in this case; and am happy to find, that this is the opinion of the Court. Since I am satisfied it will tend to confirm long practice; and preserve the peace of the country; which would have been disturbed, by a contrary judgment.

The decree was as follows:

"The Court is of opinion, that the interest of  
"the slaves, devised by the will of William Row-  
"ley to Lettice Wishart, vested in her husband  
"John Wishart, in the same manner as if they had  
"been chattels and not otherwise, so as to become  
"his property, provided they were reduced into  
"possession, during the coverture, or that he sur-  
"vived his wife, but, if neither happened, the in-  
"terest survived to his wife. That the said John  
"Wishart during his lifetime had none other pos-  
"session of the said slaves than as co-executor with  
"Richard Taylor, they being with the other  
"slaves of the testator, continued on his planta-  
"tions, under the direction of the executors  
"for

"for finishing the crops, according to the directions of the act of Assembly, until after the death of the said Wishart; and no act appears to have been done by him, testifying his election to hold the said slaves in right of his wife and not as executor, and therefore that the right survived to the said Lettice, and that the decree aforesaid is erroneous: Therefore it is decreed and ordered that the same be reversed &c. and this Court proceeding to make such decree as the said High Court of Chancery should have pronounced, it is further decreed and ordered that the bill of the appellees be dismissed &c."

Wallace  
vs  
Taliaferro.

## DRUMMOND

*against*

SNEED.

Novem: 1786.

**T**HIS cause is an appeal from the court of the county of Accomack. There Charles Sneed, appellee, exhibited a bill in Chancery against Robert Drummond, the appellant, and Jonathan Tillet and Major Chambers, stating,

That one William Burton having a daughter named Agness married to one John Welt, devised several slaves to her for life, with a remainder to her children in equal divisions.

That

after his death, was assigned, as the share of the said C. C. The said E. C. the surviving husband, took possession of the said slaves, and sold him to C. S. for a valuable consideration; after which M. C. the eldest son of the said C. C. took possession of the said slave and sold him to R. D. The sale by E. C. husband was good, and C. S. the purchaser, is entitled to the slave.

W. B. devised slaves to his daughter A. W. for life remainder to all her children. One of whom by the name of C. married E. C. and died in the lifetime of her mother & husband: Her husband took administration on her estate. A division was afterwards made of the slaves; and one by the name

Drummond  
vs.  
Sneed.

That the said Agness had nine children, one of whom named Catharine intermarried with one Edmund Chambers, and died in the lifetime of her mother and husband.

That the said Edmund Chambers administered on the estate of the said Agness.

That at length a division was made of the said slaves, and a slave named Lazer was assigned as the share of the said Catharine, together with £ 21 : 16 : 8 with interest from the 3d day of November 1766.

That the said Edmund Chambers possessed himself of the said slave and sold and delivered him to the said Charles Sneed for a valuable consideration *bona fide* paid.

That the said slave was afterwards in 1768 spirited away from the said Charles Sneed by one Jonathan Willet, who together with the said Major Chambers, the eldest son of the said Catharine, sold the said slave to the said Robert Drummond, who knew all the circumstances of the said Charles Sneed's purchase, and that the said Charles Sneed delayed the bringing of this suit until the 24th day of September 1771, merely to wait the event of a suit depending for the division of the 12 slaves. The prayer of the bill is for the restitution of the said slave, an account for his hire and the £ 21 : 16 : 8, aforesaid.

Robert Drummond answers.

That he acknowledges the will of the said William Burton, the devises therein, the intermarriage of Catharine with Edmund Chambers, her death before her mother, the birth of Major Chambers, the letters of administration by Edmund Chambers on the said Catharine's estate, as the different facts are stated in the bill.

The said Drummond denies that he knew of any right to the slaves left by the said Burton being vested

vested in the said Edmund but in the right of the said Major his son; and asserts that by a partition under a decree of the General Court on the 26th day of February 1765 the slave Lazer was allotted to the said Major Chambers upon his paying the sum of £ 26: 15: 10 with interest from the 23d day of November 1766; that he was never acquainted with the possession of the said slave by the complainant; that Edmund Chambers could not avail himself of the aforesaid decree, not being a party thereto, nor being a child, or grand child of Agness West; that he purchased the slave Lazer of Major Chambers for £ 45 *bona fide*, paid after the partition aforesaid and an assignment of the rights of the children of the said Agness to the said slave.

~~Drummond~~  
vs.  
Sneed.  
~~\_\_\_\_\_~~

Jonathan Willet answers.

That he did never entice the said slave Lazer from the service of the said Charles Sneed, and disclaims all interest in the said slave; that he believes that Edmund Chambers took possession of the said slave as father of his son Major Chambers; that upon complaint of ill usage the County Court of Accomack, as the said J. Willet believes, put the said Major and the said slave into the hands of John West, who hired him for the benefit of the said Major; that the said John West for some unknown cause surrendered the said slave and the said Edmund took possession of him; that he has never received any money for the hire of the said slave, but what he has accounted for to Major Chambers.

Major Chambers answers, admitting the facts as to William Burton's will, the death of his mother Catharine in the life time of her mother and husband; that under the decree aforesaid the said slave was delivered to the said Jonathan Willet as agent for the said Major Chambers. That the said Major Chambers sold the said slave to the said Robert Drummond; that he never knew the said slave to have been in the possession of the said Sneed;

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vs  
Sneed.

Sneed; that he never seduced the said slave from him; that he has purchased all the rights of the children of the said Agness West; that the said Drummond purchased the said Major Chambers title to the said slave at his own risk; that the said Major knows nothing of the £ 21 : 16 : 8 mentioned in the said Sneed's bill and has received about £ 10 for the hire of the said slave.

The exhibits consist of the will of William Burton, the deed of Edmund Chambers to Charles Sneed bearing date the 30th day of January 1765, and passing the said slave; the proceedings for the partition of the said slaves in which proceedings Edmund Chambers is no party until he had sold to Charles Sneed as aforesaid, fundry depositions, and the order for administration on his wife's estate in favor of the said Edmund Chambers on the 1st of May 1765.

A decree was made in favor of the said Charles Sneed and the said Drummond appealed therefrom.

The cause came on to be heard before the High Court of Chancery on Thursday the 22d day of May 1783 who adjourned it to the Court of Appeals on account of difficulty.

The counsel for the appellee. Insisted on the following points.

1. That Edmund Chambers had full power to sell the slave Lazer, as husband and administrator of his wife.
2. That he actually did sell the slave to the said Charles Sneed; which sale they contended was good, whether the said Edmund was considered as husband, or administrator.
3. That the *partition* did not affect the right of the said Charles Sneed.

The certificate of the Court of Appeals was as follows:

“ The

" The Court this day gave their opinion,  
 " that the decree of the County Court of  
 " Accomack, mentioned in the transcript of  
 " the record in this Cause, pronounced the 27th  
 " day of April 1779, ought to be affirmed; which  
 " opinion is ordered to be certified, with the al-  
 " lowance of the costs in this Court (except a law-  
 " yers fee,) to the High Court of Chancery."

Drummond  
 vs  
 Sneed.

## B L A N E

*against*

## S A N S U M.

**B**LANE, as assignee of Young, brought suit in the County Court against Sansum. The writ is in debt, for one hundred and seven pounds, four pence sterling. Damage ten pounds sterling. The declaration is also in debt; but is blank as to the sum declared for; as to the date of the bond; as to the assignment to the plaintiff; and as to the damage. The defendant having failed to appear upon the return of the writ, the proper proceedings were had, and an office judgment regularly obtained. The bond (which is in the penalty of £ 215 sterling, conditioned for payment of £ 107 : 0 : 4½ sterling) is copied into the record by the clerk.

The District Court granted a writ of *supersedeas* to the judgment, and reversed it with costs; without entering a *nil capiat per billam*. Whereupon Blane appealed to this Court,

If a declaration in debt be blank as to the sum, the date of the obligation, the assignment thereof to the plaintiff, and as to the damages, a judgment rendered thereupon is erroneous; and ought to be reversed, and the suit dismissed with the costs of both courts.

**WICKHAM** for the appellant. As the sum is right in the writ, it is sufficient under the act of Jeofails which says that the judgment shall not be arrested, after verdict, in any such case. Besides the bond is part of the proceedings, and certainly contains the true sum.

RANDOLPH

Blank  
vs.  
Lantum.

RANDOLPH *contra*. There was no verdict in this case, but a mere office judgment. No oyer was taken of the bond; which therefore is no part of the proceedings. Consequently the defects are not cured by the statute of Jeofails. Reference to the writ will not do; for that does not say that the action is founded on a bond.

*Cur. adv. vult:*

PENDLETON President. There is no error in the judgment of the District Court as far as they went; but they should have gone further, and reversed the judgment of the County Court, and dismissed the suit with the costs of both Courts; Which is to be the judgment of this Court.

## M A C K E Y

*against*

## F U Q U A.

What notice of a writ of *superfedeas* is sufficient, when the defendant is not found.

THE writ of *superfedeas* in this case was returned by the sheriff *a copy left*; and the questions were, whether, this return was sufficient to enable the plaintiff to proceed to the hearing? or whether actual service, on the defendant was necessary?

CALL for the plaintiff. Notice to the defendant is all that is necessary; and leaving a copy was sufficient, for that purpose.

RANDOLPH *contra*. The same notice ought to be given, as is required, by the act of Assembly, in other cases. That is to say, it ought either to have been personal, or left with some white person above the age of sixteen, at the dwelling house of the defendant.

The Court took time to consider, and then made the following order,

“ The

Mackey  
vs  
Fuqua,  


"The Court being of opinion, that in giving notice of the writ awarded at the last Court, the Sheriff ought to have pursued the mode prescribed by the act of Assembly, for giving notice upon replevy bonds and other lawful occasions (which does not appear to have been observed, from his general return of *a copy left*.) On the motion of the plaintiff, by his counsel, another writ of *supersedeas* is awarded him, returnable here at the next Court."

T  
H E P B U R N

against

L E W I S.

THE question made at the bar was, whether as the writ was for £ 50, the District Court ought not to have given judgment for the appellant, although the sum found by the verdict was less than £ 30.

Against the non suit it was said, that the act of Assembly was, that where the plaintiff shall claim £ 30 or upwards, the court shall have jurisdiction; and therefore as more, than that sum, was laid in the writ and declaration, the plaintiff below was entitled to judgment. That otherwise it would be in the power of the defendant, by holding up his discounts, always to nonsuit the plaintiff, and charge him with the costs of suit; as the plaintiff could not possibly know the discount which would be claimed. That upon this principle the old General Court, and the Courts in England, have sustained verdicts for sums, below the ordinary jurisdiction of the court.

The Court of Appeals cannot take cognizance of a less sum than £ 30.

Quere If the sum demanded by the plaintiff in the District Court be more than £ 30, and the verdict find less, the District Court can give judgment for the amount of the verdict?

Per:

P 3



Hepburn

vs.  
Lewis

*Per: Cur:* This court has no jurisdiction of the appeal. For the appellant appeals from the refusal of the District Court, to enter judgment, for the amount of the verdict; which verdict is for less money, than the law allows appeals to this court for; and therefore, as the very sum, which he asks this court, in the first instance, to give him judgment for, is below our jurisdiction, the appeal must be dismissed.

HERBERT

against

ALEXANDER.

What agreement or an attorney will bind his client.

ALEXANDER brought an action on the case against Herbert in the District Court, and declared, that, whereas sometime in the year 178 an action of ejectment was instituted in the General Court by Charles Alexander against William Bryan, Benjamin Vanpett and Charles Curtis lessees and tenants of the said Herbert; and whereas the said Herbert employed Edmund Randolph attorney at law, then practicing in the General Court, to defend the said action of ejectment on behalf of himself and the said tenants, by virtue of which authority, and with the consent of the said William Herbert, he the said Edmund Randolph on the 11th day of 178 then and there agreed with the said Charles Alexander, that if judgment should be rendered in favor of the plaintiff in the said ejectment, it should be entered against the said William Herbert and Dennis Ramsay for their respective tenants, and avowed that the said Bryan, Vanpett and Curtis were the tenants of Herbert, and that judgment was rendered in favor of the plaintiffs for the lands and his costs, by reason whereof Herbert became liable to

pay

pay to the plaintiff the costs: and being so liable assumed upon himself and promised to pay &c. with an averment of the amount of the costs.

Herbert  
vs.  
Alexander.

There was another count to the same effect. The defendant plead *non assumpsit*; and the plaintiff took issue.

Upon the trial of the cause the defendant filed a bill of exceptions, to the Courts opinion, stating, that the plaintiff offered in evidence a copy of the declaration in ejectment, and various steps in the cause (setting them forth;) and stating also, that the plaintiff proved by sundry witnesses, that Charles Little and the defendant employed Edmund Randolph to defend the suit, and paid the costs; and that Herbert, as guardian of his son John Herbert, received some rents from the tenants, and had the charge of some slaves on the land, and claimed the said land as guardian of his said son; and that wood was cut off the land and carried to Herbert. That it was also proved that the tenants had moved off the land before the trial of the ejectment; and some of them complained that they were made defendants. That the plaintiff also produced a writing signed by Edmund Randolph attorney employed as aforesaid, to defend said suit in these words:

"Alexander vs Vanpett &c. should judgment  
"be rendered in favor of the plaintiffs, it shall be  
"entered vs William Herbert and Dennis Ram-  
"say for their respective tenants.

EDM: RANDOLPH."

That this was signed previous to the trial of the said ejectment. It likewise set forth an execution against the tenants for the costs, which was returned *no effects*. That the defendant prayed the opinion of the Court, whether the said writing was binding on the defendant William Herbert? And whether, he the said William Herbert is chargeable with the costs of the ejectment under the foregoing circumstances, in this action?

That

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*vs.*  
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That the court was of opinion, that the said writing was binding on the said William Herbert, as being executed by the said Edmund Randolph, in the line of his duty, to enable the parties interested in the title of the said land then in question to have a fair trial; although it was proved that the said William Herbert the defendant was not present at the time the said engagement was entered into, and it was not proved that the said William Herbert the defendant either verbally, or by writing, ever authorized the said Edmund Randolph to enter into such engagement.

It appears by the proceedings in the ejectment, as if the declaration (which is in the name of Timothy Goodtitle, on the demise of the plaintiff Charles Alexander) had been originally filled up against Bryan, Vanpett, Curtis and Rallings the tenants in possession. After which the names of Little and Herbert seem to have been inserted. The tenants names those of Wronghead the casual ejector of Little and Herbert then appear to have been erased, and the names of the tenants only inserted. *Not guilty* is put at the foot of the declaration; and Mason added for the plaintiff and Randolph for the defendant. It appears to have been once indorsed *Alexander vs Wronghead, Little &c.* but the words, *Wronghead, Little &c.* are erased; and the words, *Bryan & al*, inserted. On the 24th of April 1783. The suit after various continuances appears to have stood in the name of Timothy Goodtitle against Francis Wronghead; and upon that day, Little and Herbert were, on their motion, made defendants, and by Edmund Randolph, their attorney, plead the general issue &c. In October 1783, the tenants, with the consent of the plaintiff, were again admitted defendants, in the room of Little and Herbert; and by Randolph their attorney plead the general issue &c.

The

The jury found a verdict, and the court gave judgment for the plaintiff. From which judgment Herbert appealed to this court.

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Alexander  
~~vs~~

**RANDOLPH** for the appellant. The distinction between an act collateral to, and one which is directly within the duty of the attorney. 3. *Vin.* 26. 304. The last is binding on the client, but not the former; and here the agreement was entirely collateral.

**CALL** *contra*. The agreement was not collateral, but directly within the attorney's duty; and if the rule of consolidation had been applied for, it would have been granted, & all the suits were relative to the same object, and depended on the same title. The application was probably dispensed with, for the sake of convenience, amongst the counsel; and therefore it ought to be obligatory on their clients. The record clearly proves, that he was Herbert's attorney; and therefore had authority to consent for him.

*Cur. adv. vult.*

**ROANE** Judge. The decision of this case turns upon the power of the attorney to bind the appellant, by the agreement stated in the bill of exceptions.

It states, that a declaration, in ejectment, was served upon all the tenants in possession; that, in April 1783, Herbert and Little were made defendants, on their motion; and that, in October 1783, the tenants were made defendants, with consent of the plaintiff, in the room of Little and Herbert.

This last order is not stated, to have been made, on the motion of the tenants; but, however the case may stand, as to the liability of the defendants, who are made so, without their own application, this order clearly discharged the appellant as a defendant.

The

Herbert  
vs  
Alexander.

The tenants in possession are the proper, if not the natural defendants to an ejectment; although the landlord has a right to be made a defendant, through fear that he may be injured, by a combination between the plaintiff and his tenants; but he may waive this right, or having asserted it, he may relinquish it, by consent of the plaintiff.

The question then is, whether, after the order of October 1783, the attorney was the appellants attorney, so as to subject him to costs of the suit. And I presume he was not. He was the attorney of the then defendants. The direct end of his functions, as such, was to finish the suit, between the real parties to it; and it was certainly collateral to that end, to bring in another person, as a defendant; and subject him to costs, who had been discharged by consent of the plaintiff.


The authorities, cited by the appellants counsel, shew, that the powers of an attorney do not extend to this collateral matter.

The bill of exceptions states, that the appellant employed Mr. Randolph, and paid the costs of the tenants; but this is the mere common case of one man (perhaps ultimately interested) defending a suit in behalf of another. His acting, however being merely voluntary; and the attorney, employed by him, being the attorney of the party to the suit, and not his attorney.

It is stated, in the bill of exceptions, that the defendants had moved away, before the trial; but it is not stated, that this removal had taken place before the agreement, made, by the attorney. So that it may be, that the appellant, who had been discharged by consent of the plaintiff, was again subjected, as defendant; when the real defendants were on the premises, and responsible persons.

Upon the whole case, although perhaps justice would be promoted and circuity of action avoided by holding the appellant liable, yet it cannot be done, without infringing the principles of law,  
and

and establishing a dangerous precedent. Therefore I think the judgment ought to be reversed.

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Alexander  


**FLEMING** Judge. If the agreement was binding, at all, the plaintiff should have had his judgment so entered up, and not have put the appellant, unnecessarily, to the costs of another suit, about it. But it certainly would be an extremely dangerous principle to lay down, that the agreement of an attorney, in a suit between other persons, should bind a man not before the court, without his consent or knowledge. I cannot bring my mind to assent to such a proposition. Besides it appears, to me, that the plaintiff, by taking his judgment against the tenants, and pursuing them, with an execution, waived the benefit of the promise, if it ever was binding upon the defendant. Upon the whole, I think the judgment is erroneous, and ought to be reversed.

**CARRINGTON** Judge. Concurred, that the judgment ought to be reversed.

**LYONS** Judge. It is extremely probable, that the attorney was authorized by the defendant to make the agreement; but as no such authority specially appears of record, the question is, whether the agreement binds the defendant, who was no party to the suit?

An attorney at law only represents the plaintiff or defendant in court, to do such acts as the plaintiff or defendant, if in court, might do himself; but he has no right to enter into private or executory contracts. Such a dangerous power ought not to be implied; especially against a stranger to the suit, who had no occasion for an attorney to represent him in it. For if so, he might subject any person he pleased (although such person was no party to the suit) to payment of the debt, damages and costs: Which would be intolerable. I am therefore of opinion, that the direction, given by the District Judge, was wrong; and con-

sequently

Herbert  
vs  
Alexander.

frequently that the judgment ought to be reversed, and a new trial awarded.

PENDLETON President. It appears by the record that the Judge directed the jury, on the motion of the plaintiff, that Mr. Randolphs agreement was binding on his client Herbert, as being within the line of his duty, to enable the parties interested in the title to have a fair trial; although it was proved that Herbert was not present at the time, and it was not proved that he ever, verbally or by writing, authorized Mr. Randolph to enter into such engagement.

And the question is, whether this was a misdirection?

For although I am satisfied, that the jury might fairly have presumed Herbert's consent either previous or subsequent, yet since they might have been influenced by the direction, if that was wrong, there should be a new trial.

To come to the real question, it is necessary to establish some positions, which appear to me to have influence.

1. That although in ejectments tenants are made defendants, and in subsequent suits for mesne profits are, in some instances, considered as defendants, yet the landlord, whose title is controverted, is in fact the real and essential party; and ought in justice to pay the costs of the contest, if they fail.

2. Ejectments, although possessory actions, are used to try titles; and being compounded of fictitious proceedings are more under the power of the Court than ordinary cases; and that they may, pending the suit, judge of the admission, or change of defendants, as may appear necessary to justice and a fair trial; that, but for this agreement Alexander might, in 1786, have moved that Herbert should be restored as defendant, shewing that he was deceived into a consent to change him.

This

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vs  
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This answers the objection for want of consideration; since, although the promise might not import gain to the promissor, yet if the other was induced by it, to waive any advantage he might have had, it is a good consideration.

3. That the agreement was not unjust or unreasonable. It was Herbert's title that was to be controverted; and the expence should in justice fall upon him. He employs Mr. Randolph to defend the suit, is entered as defendant, and although others were afterwards entered (probably without their consent, for it is proved they complained of it,) yet it appears that he continued to act as the real defendant by paying their costs throughout; although the cause was not tried 'till 1793, seven years after this agreement. Circumstances of important consideration, in this liberal action on the case.

It is asked why the judgment was not entered against the defendant?

I can assign the reason;—It might proceed from inattention; or from a confidence in the honor of the defendant; which might induce the plaintiff to suppose that it was unnecessary. However, that it was not done, is the breach, which the plaintiff complains of.

The defendant was not present, and no special power appears to have been given to Mr. Randolph to make the agreement: Which comes to the question, whether it is binding on the defendant, as a client, under his general authority?

When a man employs an attorney to defend a suit, he confides to him a power to judge of, and pursue the modes of defence throughout, and is bound by what the attorney does in the progress of that suit, so as it be confined to fair proceedings and not foreign to the defence of the suit; thus the attornies consent, to stand to an arbitration, will bind his client. 1. *Bac: ab. (new edit.)*  
292.



Herbert  
*vs.*  
 Alexander.

To the present point, a case is there cited, from *Salk. 86*, which seems to apply.

In that case, the attorney agreed to waive a judgment obtained by his client, for want of the defendants joining issue, on a replication to the plea of the statute of limitations, and to accept the issue. On a motion to compel him to accept it, it was opposed, because the plea was a hard one, and the client having notice of the advantage, ordered the attorney to insist upon it. The court said as it was a hard plea, they would not have compelled him, if he had not consented to waive the advantage; but now they would hold him to his consent: And as for the client, he was bound by the consent of his attorney, and they could take no notice of him.

Here the attorney waived, in effect, the change of others as defendants, and agreed to restore Herbert his only client, and the real person interested, to his original liability.

All which was fair; and within his power, as attorney. Therefore I think the judgment should be affirmed. But as a majority of the court are of a different opinion, it must be reversed with costs.

The judgment was as follows:

“ The court is of opinion, that the said judgment is erroneous in this, that the said court misdirected the jury, respecting the writing in the bill of exceptions stated to have been signed by Edmund Randolph: Therefore it is considered that the same be reversed &c. And it is ordered, that the jurors verdict be set aside, and that a new trial be had in the cause.”

## H O M E

*against*

R I C H A R D S.

**P**ENDLETON President. Home and Richards was thought to have been settled by the former decision; but the party desired to be heard on evidence; and the only question now is, whether the mill is injurious. The witnesses are divided; and the County Court and District Court sitting in the neighbourhood have both decided that it was not. The judgment of the District Court must therefore be affirmed.

Judgment Affirmed

Where in a petition for a mill the witnesses are divided whether it will be injurious or not, and the County Court and District Court both decide that it will not, this court will affirm the judgment.

DOWNMAN &amp; al Exrs. of DOWNMAN

*against*

DOWNMAN &amp; al.

**T**HIS was an appeal from a judgment of the District Court upon a forthcoming bond given to the plaintiffs, by Rawleigh Downman, George Glascock and William Downman, upon an execution sued out by the plaintiffs against Rawleigh Downman and George Glascock. The motion was made against Rawleigh Downman, George Glascock and William Downman.

Upon the trial of the motion, the defendant George Glascock filed a bill of exceptions stating, "that he moved the Court to admit evidence to establish, that the original judgment was obtained against Rawleigh Downman and George Glascock deceased, (and not the present defendant)

In a motion on a forthcoming bond, the defendant not allowed to prove, that the execution issued against another person of the same name who is now dead.

" who

Downman  
vs  
Downman

" who was bail for the appearance of the said  
" Downman at the suit of the plaintiffs, and that  
" the execution was levied on the property of  
" George Glascock, the present defendant, and  
" not the property of George Glascock deceased;  
" To which the plaintiffs counsel objected; and  
" that the Court sustained the objection."

The District Court gave judgment for the plaintiffs against all the defendants; and thereupon Glascock appealed to this Court.

*Per: Cur:* Affirm the judgment of the District Court.

Judgment Affirmed.

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ALEXANDER

against

HERBERT.

After judgment for the plaintiff in ejectment, trespass does not lie against one, who was no party to the suit, without proving an actual trespass.

ALEXANDER brought trespass *quare clausum fregit* against Herbert, in the District Court. The defendant pleaded not guilty; and the act of limitations. Issue.

Upon the trial of the cause, the plaintiff filed a bill of exceptions stating, that the defendant offered in evidence a case agreed or special verdict, in a suit between Charles Alexander plaintiff, and Vanpett &c. tenants of Carlyle defendants, relative to a tract of land, (setting it forth,) together with the judgment of the General Court, and Court of Appeals thereupon. Also a copy of a consent rule in the General Court, that the suit of *Goodtitle vs Bryan* and others, \* should await the decision of the other. Likewise a copy of the proceedings in the suit of *Goodtitle vs Bryan* and others;

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\* Vid. Ante 498.

Alexander

Herbert.

}

others; and of the agreement of Edmund Randolph. \* That in case judgment should be rendered for the plaintiff, it should be rendered against Herbert and Ramsay for their respective tenants. That the plaintiff also proved, by parol testimony, that Randolph was employed by Little for himself and Herbert, to defend the titles as well of such of the said defendants in the said ejectments as were tenants to Carlisle Fairfax Whiting, an infant, whose guardian Little was, as of such of them as were tenants to John Herbert an infant, whose father and guardian the defendant William Herbert was. That the defendant objected, to all which evidence, and the court were of opinion, that it ought not to be admitted.

There was a verdict and judgment for the defendant; and from that judgment Alexander appealed to this Court.

CALL for the appellant. If there be judgment against the casual ejector, trespass lies against the owner, although not named in the record of the judgment against the casual ejector. 2. Wils. 115; and this is substantially the same thing, as the record shews, that Herbert was really the true defendant; and perhaps this evidence was only intended as inducement to the proof of the trespass, as the bill of exceptions does not state the whole evidence.

RANDOLPH *contra*. There is nothing to shew, that any trespass was committed; and if it was intended as inducement only, the other side should have shewn it. Herbert was no party to the suit, for the agreement of the attorney was not applicable to the case; and therefore the whole evidence was irrelevant, and properly rejected.

*Cur: adv: vult.*

PENDLETON President. There is some difference amongst the Judges in their reasons, but they

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\* Ante 499.

Alexander  
vs  
Herbert.

they all unanimously agree that the judgment should be affirmed.

BRANCH & al.

against

THE COMMONWEALTH.

Bond given by a sheriff, through, mistake, for the taxes imposed under an expired law, will not bind the securities, for those of the true year.

But the commonwealth's remedy is by action against the sheriff.

*Quære:* If a sheriff's bond directed to be paid to the treasurer; is good, if made payable to the Governor?

*Quære:* also, if the sum due from the sheriff was payable in facilities, the jury may not consider the value of the certificates, at the time they ought to have been paid? and whether they are bound

THE plaintiffs became security for one Benjamin Branch, sheriff of the county of Chesterfield, in a bond in the following words:

"Know all men by these presents, that we Benjamin Branch sen. Benjamin Branch jr. and Edward Branch are held and firmly bound unto Benjamin Harrison Esqr. Governor of this Commonwealth in the sum of ten thousand pounds current money of Virginia, to be paid to the said Benjamin Harrison Esqr, or to his successor or successors for the use of the said Commonwealth to the payment whereof, well and truly to be made, we bind ourselves jointly and severally our joint and several heirs, executors and administrators, jointly and severally, firmly by these presents, sealed with our seals and dated this 5th day of November 1784.

"The condition of the above obligation is such, that if the said Benjamin Branch sen. Gent. sheriff of the county of Chesterfield do and shall, truly and faithfully collect, pay and account for all taxes imposed in his said county, by virtue of an act of Assembly entitled an act for calling in, and redeeming certain certificates, then the above obligation to be void otherwise to remain in full force and virtue." On this bond suit was brought in the name of Edmund Randolph Governor and successor of Patrick

Henry

to allow the 15 per cent given on motion, or may not judgment of the real damage?

try who was successor of Benjamin Harrison in General Court in March 1787, for the use of Commonwealth against the plaintiffs only without the principal. The declaration set out the condition, and charged the breach in the words of the condition. In June term 1797 the securities who alone were sued) pleaded conditions performed, on which plea the Attorney General took issue. The jury found a verdict for £ 3193:19:7; and the General Court gave judgment, for the same, with costs: To which judgment Branch obtained writ of *supersedeas* from this Court.

Branch  
vs.  
Commonwealth

**PENDLETON** President. A suit is brought in the General Court, by Edmund Randolph, as Governor and successor to Benjamin Harrison, on a bond entered into by Benjamin Branch, as sheriff of the county of Chesterfield, with the defendants as his sureties, dated November 5th 1784 and payable to Mr. Harrison, as Governor, and his successors, for the use of the Commonwealth.

The declaration states the bond and condition, which is, that the sheriff "shall faithfully collect, account for and pay the taxes imposed in his county, by virtue of an act of Assembly entitled *An act for calling in and redeeming certain certificates;*" and the breach assigned is, that he had not collected, accounted for and paid the taxes imposed in his county, by virtue of that act.

On the plea of *conditions performed*, and a general replication, the jury find, that Edward Branch senr. had not performed the condition of the bond, in the declaration mentioned, but had broken the same, as in the declaration is assigned; and they assess the damages to £ 3193:19:7. For which a judgment is entered; and to that judgment, the writ of *supersedeas* has been awarded.

In the record there is an account, in which the securities are made debtors to the Commonwealth for the amount of the certificate tax of 1785; and after giving credit for commissions and payments in-

to

Branch  
vs  
Commonwealth

to the treasury, a balance is stated of £ 2777:7:11 on which 15 per cent damages are charged, £ 50 added, without mentioning for what; bringing together the before mentioned sum of £ 31. 19:7, the amount of the verdict.

The first objection made to this judgment is, that the bond is payable to the Governor instead of the Treasurer; to whom the act of Assembly directed the bond to be made payable: This objection, with its consequences, the Court thought it unnecessary to consider; since a more material objection to the bond occurs, and which was the ground for awarding the *supersedeas*.

The title of the act, referred to in the condition is, *An act for calling in and redeeming certain certificates*. And the only act, we find with that title, passed in May 1782: Which imposed taxes to be collected in 1783 only; and was not a continuing tax. In May 1784, an act passed, entitled, *An act to revive and amend an act entitled an act for calling in and redeeming certain certificates*, reciting in the preamble, that certificates remained outstanding, and it was necessary to revive and amend that act, but without reference to, or other mention of that act, in the enacting part, the Legislature proceeded to impose taxes for the purpose payable annually on the first day of January; and the Courts are directed to take bonds, yearly, of the sheriffs, in £ 10,000 penalty, payable to the Treasurer for the use of the Commonwealth; with condition for the faithful collection, accounting for, and payment of the taxes *thereby imposed*, according to the act *for establishing a permanent revenue*; subject to the regulations, allowances and penalties of that act; which passed in the year 1782.

It was under the new act, that the present bond should have been taken, for the collection of 1785: But by mistake, we suppose, it applies to the act of 1782, for the collection of the taxes in 1783; which Branch the sheriff had nothing to do with.

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The securities therefore are not bound for his collection in 1785; and the present suit cannot be supported against them on this bond: But the remedy of the Commonwealth is against the sheriff (or rather his estate, as it seems he is dead,) for the amount of the taxes received. On this ground the judgment is wholly reversed: Which renders a consideration of the other objections unnecessary.

Branch  
vs  
Commonw<sup>l</sup>'th

On the trial in a new suit, two objections occur, as worthy of consideration. The first is, as the taxes were payable in facilities, and the sheriffs by subsequent laws are allowed to discharge their arrears by such, whether the jury may not properly enquire, if the facilities were at the time, of equal value with specie, and adjust their damages accordingly? The 2d is, whether they are bound to charge the sheriff with 15 per cent given by law upon motion, or may not, unbound by that law, judge of the damages, which he ought to pay for his default? However these points are just hinted for consideration, without the courts meaning to give any influential opinion, either way, upon the subjects.

CASES

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APRIL TERM  
CASES  
ARGUED AND DETERMINED  
IN THE  
COURT of APPEALS  
IN  
APRIL TERM OF THE YEAR 1864

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MARTIN AND JONES EXECUTORS  
OF FAIRFAX  
against  
STOVER,

The Court cannot be called on, to instruct the jury to find a verdict for the defendants; although some of the evidence is written testimony.

**T**HIS was an appeal from a judgment of the District Court, affirming a judgment of the County Court. Where Stover brought an action on the case against the executors of Fairfax, and declared for money had and received by the defendants to the plaintiffs use. Pleas *non assumpsit*, and *non assumpsit* within five years. After which the record goes on in these words, *which plea the plaintiff by his attorney joined*. A jury was sworn to try the issue joined. Who found that the defendants did assume, in manner and form &c. that the said assumption was made within five years &c. and they assessed damages to 956 dollars 66 cents. For which the Court gave judgment, to be levied of the goods and chattels of Lord Fairfax at the time of his death &c. *Si non* then the costs &c.

The defendants upon the trial of the cause filed a bill of exceptions, which stated, that the plain-

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It offered, in evidence, a decree of the High Court of Chancery on the 8th day of May 1786, between the representatives of Joist Hite, Robert Green, William Duff and Robert M'Coy plaintiffs and the executors and the heir at law of Lord Fairfax and others defendants; which decree is set forth in *hæc verba*, and directs that the heir and devisee of Lord Fairfax should convey certain lands, contained in the memorial of Thomas Marshall and others, reserving to all persons (except the heirs, devisees and executors of Lord Fairfax) any claim, which they may have in the said lands. The defendants to have liberty of finishing, gathering, and carrying off, the then growing crops. That the plaintiff should have an account against the estate of Lord Fairfax, for the profits of the said lands, from the first day of January 1750, allowing for lasting improvements, composition money and quitrents (which account was ordered to be made before James Pendleton and others;) and that the plaintiffs ought to be at liberty to resort to the Court, at any time before the final decree, for any damages, which they might make it appear, they had sustained, in the loss of any other surveys, not then carried into effect.

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vs.

Stover.

Also a paper purporting to be extracts, from the report of James Pendleton &c. which states, first, the improvements on the plaintiffs lot of 38 acres, third rate high land, with the exceptions thereto. 2dly another statement, between others of the claimants and the executors of Lord Fairfax under the decree aforesaid with the exceptions thereto.

Also another decree of the High Court of Chancery November 19th 1787, between the representatives of Joist Hite deceased and others plaintiffs, and the heir at law and executors, or other legal representatives, of Thomas Lord Fairfax deceased and others; which after stating that the decree of the Court of Appeals had reserved,

to

Martin &amp;c.

vs.

Stover.



to Lord Fairfax's executors, the right of shewing that his estate was not liable for the profits, decides that point against them, giving liberty to except to the items of account. It then states that the parties consented to suspend the consideration of the account, so far as related to profits arising from lands, concerning which claims had been filed founded upon the titles derived from the plaintiffs or their ancestors, until those claims should be discussed; and that Lord Fairfax's executors waived their exceptions in the case of Holman's orphan from the 3 to the 8 inclusive, and all of a similar nature in other cases. Refuses interest on the profits: and provides for payment of the costs.

Also another decree of the High Court of Chancery between John Hite, Isaac Hite and others plaintiffs, and the executors and heir at law, or other legal representatives of Lord Fairfax defendants, dated May 8th 1786; which dismisses the bill of Solomon Huddle and others (of whom the plaintiff is one) for the *narrow passage* land; which they claimed under the decree of the 8th of May 1786 aforesaid.

Also the deposition of Isaac Hite, that he was present at a meeting at Woodstock, after the commissioners report aforesaid in the suit between Isaac Hite the father of the deponent, and one of the claimants, under Joist Hite of the *narrow passage* land. When there was a conversation relative to a compromise, concerning the rents and profits, mentioned in the decree. That the said Isaac proposed to the defendant Jones, that the persons entitled under the decree would take £ 8000; which Jones refusing, a lesser sum was agreed on by said Isaac; who, afterwards met Jones at the house of the defendant Martin; where Isaac proposed, that the claimants would take £ 7000: To which Martin agreed; and the money was paid to Isaac and the *other persons interested*; whereupon all claims to profits under the

decree

tree were released by the said Isaac Hite and other claimants. That the deponent doth not believe that his father would have consented to take £7000, had he not supposed that the defendants were entitled to a credit, for improvements.

Martin &c.  
vs  
Stover.

Also the deposition of Ulrich Keener, that, being interested in the decrees, he asked the defendants Jones what he should do? who referred him to George Nicholas. That at another time he asked Jones, if he should petition the Assembly respecting the land? That Jones, afterwards, drew the heads of a petition, and delivered them to the deponent.

“That there being no other evidence, the defendants moved the Court to instruct the jury to find for the defendants, the said testimony being illegal and insufficient, and therefore not entitling the plaintiff to his action against the defendants; which the Court refused to do, and the jury therefore acted on the said testimony without.”

CALL for the appellant. There is no issue joined upon the plea of the statute of limitations; for there is no replication denying any of the allegations contained in it.

Neither is the declaration maintained by the evidence. For the count is for money had and received, and there is no testimony tending to shew, that any money was received by the defendants: whose promise, for the debt of their testator, could not bind, unless it had been reduced into writing, according to the directions of the act of Assembly, concerning frauds and perjuries.

But the plaintiff ought not to have been permitted to recover on this declaration; because it was too general, and gave no notice to the defendant of the nature of the dispute. 2. *Wasb.* 172.

Upon

Martin &amp;c.

vs.  
Stover.

Upon these grounds the court below would have done right, in instructing the jury, that they should find for the defendants; for the plaintiffs claim being supported by records, it was the province of the court, and not of the jury, to decide upon them. For wherever matter of law, or the construction of written testimony, occurs, it belongs to the court to consider it. 1. *Term Rep.* 189 *Calvert vs Bowdoin* \* in this court, 1. *Wash.* 229 *Syme vs Butler* executor of *Aylett* † in this court.

**WICKHAM contra.** The doctrine, last contended for, is expressly contrary to that laid down in *Keel & Roberts vs Herbert*. 1. *Wash.* 203 and *Wright vs Washington*. 1. *Wash.* 357, as well as to what was said in the very case of *Finch vs Tweat*, cited on the other side. All which expressly state, that the court cannot instruct the jury, to find a verdict for one of the parties. Which is consistent with the decision in *Calvert vs Bowdoin*; for, in that case, the court below affirmed, to the jury, that the evidence was sufficient to maintain the action; and this court reversed the judgment.

Besides the court has often decided, that a bill of exceptions cannot be considered as a demurrer to evidence; and the argument of the appellants counsel only amounts to an attempt of that kind: For, if his objections were well founded, they ought to have been brought on, by demurrer to evidence, and not by a bill of exceptions.

But there is no ground for the objections; because the improvements made by the plaintiff, were allowed the executors of Lord Fairfax in the account, between them and the Hites; and therefore it was so much money received by them to the plaintiffs use. As to the exception relative to the issue, it is, at most, but a mere misjoinder.

CALL

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\* In 1791. M. S. Reports.

† 2. Call's Rep. 105.

Martin &c,  
*vs*  
 Stover.

**CALL** in reply. In *Calvert vs Bowdoin*, the court, not only declared, that the court below was wrong in affirming to the plaintiff that the evidence was sufficient, but they went on to non-suit the plaintiff; and, therefore, decided on the competency of the evidence. Which being written, in that case, as well as in this, that case proves, that the court, and not the jury, should decide the matter of law. In that respect the present case differs from those relied on, upon the other side. In those the evidence was parol; but in this there was a construction of papers. The declaration was too general, and gave no notice to the defendants. Besides it should have been for money laid out and expended, and not for money had and received to the plaintiffs use.

*Cur: adv: vult.*

**LYONS** Judge. Delivered the resolution of the court, that the judgment of the District Court should be affirmed; that there was, perhaps, an error in the courts entering the judgment *de bonis testatoris*; but, as it was for the benefit of the appellant, and the other side was not dissatisfied, that the appellant had no cause to complain.

Judgment Affirmed.

**MORRIS.**

## MORRIS and WIFE.

*against*

OWEN and WIFE and EDWARD

*et e contra.*

Testator devises slaves and personal estate to his wife, during widowhood, and then to be divided, at her discretion amongst his children. The wife gave one of the slaves, in 1774, to one of his children, by parol gift; It was a good execution of the power as to that slave.

The wife could not, under the power appoint to the testator's grand children:

And the part of the property which was ineffectually appointed, or not appointed at all, remained as part of the residuary estate of the testator undisposed of by his will; and ought to be

**T**HIS was an appeal from a decree of the High Court of Chancery. Where Richard Brown Owen and Susanna his wife, and John Edwards, brought a suit against Henry Morris and his wife, Mason, who was a daughter of Henry Simmons deceased; and against the grand children of the said Henry Simmons deceased.

The bill states, that Henry Simmons by his last will devised, as follows, "Item I leave to my dear and well beloved wife Susanna, during her widowhood, the plantation whereon I now live with the lands below the school house branch together with the negro slaves here mentioned: Moses, Cupid, Sam, Jemmy, David, Phillis, Phœbe, Palunce, Isaac, Jacob, Amy with their future increase; likewise all my stock of all kinds, after the legacies hereafter mentioned, and all my household furniture to dispose of amongst my children as she thinks proper." And after other specific legacies, "Item my intent and meaning is, that my well beloved wife Susanna Simmons shall enjoy the labor of the slaves given during widowhood, may be during her life, with their future increase, and then to be divided, at her discretion, amongst my children." That Susanna Edwards, one of the testator's children, was living at his death; and that his widow, in pursuance of the power, appointed and disposed of one of the said slaves (named Joan) and her increase to the said Susanna Edwards, to take effect in

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divided amongst his children, according to the statute of distributions.

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in possession, after the death of the said widow, who reserved, to herself, the use of the said slave and increase, during her own life. That the plaintiffs Sufanna Owen and John Edwards are the only children and legal representatives of the said Sufanna Edwards, who died intestate.

That the said Sufanna Simmons, the widow, afterwards, had her will wrote; and thereby, in pursuance of her power, devised four of the first mentioned slaves to the plaintiff Sufanna, and her sister Martha; who is, since dead intestate, leaving the plaintiffs Sufanna Owen and John Edwards her co heirs. That she, at another time, directed the writer of her said will to insert some other requests, but expressly desired, that just mentioned to be retained unaltered. That the writer, through hurry and mistake in copying the original draft, left it out. That the will was executed, without being read to the testatrix; and therefore, although admitted to record since her death, is not the last will of the said testatrix: But, if it is, that still the plaintiffs have sustained an injury thro' accident. That, of all the children of Henry Simmons the testator, only Mason the wife of Morris was alive, at the death of the said Sufanna Simmons, the widow: Who, by her said will, devised sundry of the first mentioned slaves to the said Mason; and others of them to the descendants of the other children of the said Henry Simmons, except the plaintiffs Sufanna and John; who were deprived by accident as aforesaid.

That the plaintiffs Sufanna and John are entitled to the first appointment of the slave Joan; and to the four intended to be devised, if the said instrument is the last will of the said Sufanna Simmons, the widow. Or if it is not; that then they are entitled, under the statute of distributions, as representing their mother.

The answer of Morris and wife, denies the appointment of the slave Joan. Admits the defend-

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ants have heard of the said first will being drawn but not executed, by the said Susanna Simmons. States that a will was, afterwards, duly made and executed by her; which devised one of Joan's children, by the name of Moses, to the plaintiff John. That the defendants have heard, that the testatrix intended to insert a clause in favour of the complainants, but know nothing of their own knowledge, and call for proof, if the allegation is material. Admits that the defendant Mason was the only child, living at the testatrix's death; and submits to the decision of the court. General replication and commissions.

A witness says, that she was present when the will was written: That it was not read to the testatrix; nor did she read it herself.

Another witness speaks to the same effect as the last; and adds, that his father carried the will home. So that the testatrix never saw it, afterwards.

A third witness says, that in 1774 she was called by Mrs. Susanna Simmons to take notice, that she gave Joan (who was then present) and her increase to her daughter Susanna Edwards; reserving her own life therein. That sometime afterwards Susanna Edwards wished to carry the slave home, but Mrs. Simmons refused, saying that she would never give them, out of her own possession, during her life.

A fourth witness says, that in 1791, Mrs. Simmons asked him to write her will; which he did, but no witnesses being present, she deferred executing of it, until another time. That she did not carry a copy of it with her, but the deponent sent it to her a few days afterwards. That in 1793, Mrs. Simmons sent for him, and told him she wished some alterations in the will; which he found still unexecuted. That the deponent wrote the alterations; but his mind was agitated on account of his wife, who lay dangerously ill; and he does not recollect,

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Next, that he read over the transcribed copies of the testatrix. That the clauses, in the old will, were numbered; and he did the same in the new, making them equal, without adverting to the additional bequests; whereby, the devise to the complainants was omitted. Recites the clause and says, that the slaves, mentioned in it, he knows were once intended for the plaintiff Susanna, and her sister Martha; although Mrs. Simmons, afterwards altered her mind as to Moses, and gave him to the plaintiff John.

A fifth witness says, That after the death of Susanna Edwards, she heard Mrs. Simmons say, she was sorry she had not given Joan to her, while living; as she feared, she could not give her to her children, now she was dead.

The will of Susanna Simmons (whereof the defendant Morris was appointed executor) gives a considerable proportion of the property to the defendant Mason. It also devises some trifles to the plaintiff Susanna, and her sister Martha.

The Chancellor decreed that the parol gift of Joan and her increase to Susanna Edwards was good. And being of opinion that the plaintiffs could not claim her and under the will too, waived deciding the other points relative to the paper being a will; and, if a will, as to the right of correcting it.

The defendants appealed to this Court; and so did the plaintiffs.

WICKHAM for the appellants. The parol appointment, if good, is not sufficiently proved. For there was a previous altercation between Mrs. Edwards and her mother, at the time of the supposed gift; and after the death of Mrs. Edwards, the mother expressed her concern, that she had not given her a slave, during her lifetime; as she feared she could not now give it to her children.

Besides, in order to make a gift effectual, it should be accompanied with a delivery of possession;

on;

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on; otherwise, it amounts only to a mere intention, and is liable to be revoked. Want of possession therefore defeats the whole act.

But if the parol gift were complete in all respects it was still void, under the act of Assembly, for preventing fraudulent gifts of slaves.

The claim for a provision under the will cannot be supported. For although it might have been doubtful, whether, if the object of the intended appointment was capable of taking at the time, the court would not have supplied the defective act, yet that question is not worth discussing in the present case; because the objects were incapable of taking. For grand children cannot be substituted for children, under such a power as this. *Alexander vs Alexander* 2. Vez. 240. *Adams vs Adams Cowp.* 651. *Robinson vs Hardcastle* 2. Bro. Cb. cas. 30, 344. The last case shews, that Morris may take the benefit of the devise, and a share of the surplus too.

**CALL contra.** The gift is proved expressly; and the subsequent declarations of Mrs. Simmons did not destroy it. For it was not in her power to defeat the appointment, when once made.

Possession was not necessary to be delivered. Because the gift was not to take effect, in possession, until after the death of the mother. It was therefore a mere gift of a remainder; which does not require actual tradition of the property. In this case, possession was, in fact, given, as far as the nature of the thing would admit of; because the slave was present, and the gift was attended with every circumstance, which could serve to shew a disposing mind.

The statute respecting fraudulent gifts of slaves has no influence on the question. For the difference is, where an interest passes from the person making the appointment, and where it does not. The first requires the forms of the statute, but the other not. *Pow. Powers* 84. But here no interest passed

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from Mrs. Simmons; because the devise to the children was absolute, and the mother had only a power of controuling it. So that her power was only collateral, and the exercise of it rather tended to divest the rights of the others, than to transfer a new interest to the appointee.

Besides it is a case not within the policy of the Act; which was made to prevent owners, from making fictitious gifts of their slaves, to the prejudice of creditors and purchasers. But here Mrs. Simmons was not owner, and therefore the statute did not apply to her. For neither a creditor, or purchaser, could complain of deception, with regard to property, which she never owned; and with respect to which, she was only a third person, exercising a collateral power over an estate, which belonged to another person.

The will of Mrs. Simmons was void; because neither written by herself; nor wholly dictated by her at the time; nor read by herself, or to her, after it was written.

But if the court should be of opinion, that the usual appointment was insufficient, and that the will is good, but the grand children could not be substituted for children, then the plaintiffs were entitled to their mothers share of the unappointed surplus. Which ought to be decreed them.

WICKHAM in reply. If there is any question about the validity of the will of Mrs. Simmons, there should be an issue. But there is none, for it was written in her presence, and by her direction. The gift of the remainder of a slave without possession delivered, would not be good. In order to render it effectual the donor should deliver the slave to the donee, with a stipulation, that the donee should redeliver it to the donor, for his life. The act of fraudulent gifts does apply to the case. For if a purchaser were to examine the will of Henry Simmons, and then to see a regular transfer from Mrs. Simmons in writing, he would be led

to

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to venture his money; although there might be a secret conveyance by parol, which was unknown to him.

CALL. The statute neither in words or intention embraces a case of this kind; for it relates to owners only.

*Per: Cur:* The Court is of opinion, *That* there is no error in so much of the decree, as establishes the verbal gift, made by Susanna Simmons to Susanna Edwards, one of the children of Henry Simmons, of the negro girl Joan, and her increase; and as adjudges the same a good appointment of the said slave to the said Susanna Edwards, pursuant to the power given to the said Susanna Simmons, by the will of her husband Henry Simmons in the decree and proceedings mentioned; nor as orders the appellant Henry Morris, to deliver to the appellees, and the said David Jackson, the said slave Joan, and her increase; and to account for their profits: *But* that there is error in so much of the said decree as declares and determines, that the appellants are not entitled to any other part of the estate, which the said Henry Simmons, empowered his widow, to distribute amongst his children: This Court being of opinion, *That* so much, of that part of the said Henry Simmons's estate, as was not, *by proper act or deed*, distributed, by the said Susanna Simmons, to and amongst the children of the said Henry Simmons, in execution of the power aforesaid, remained as part of the residuary estate of the said Henry Simmons, undisposed of by his will; and ought to be divided amongst all his children, according to the directions of the statute, made for the distributions of intestates estates: *That* the said Susanna Simmons had no authority, under the power given by the said will, to distribute, or appoint, any part of the said estate to *grand children*, or to any person or persons, other, than the children of the said Henry Simmons: *That* the appellants are entitled to a distributive share of the residuary

fiduciary estate of the said Henry Simmons their grand father, in right of their mother Susanna Edwards deceased, who was one of the Children of the said Henry Simmons; and that, after an account hereof taken, their distributive share, or shares, hereof, should be decreed to them, according to law. *Therefore* so much of the said decree as is before stated to be erroneous, is to be reversed, with costs; but the residue is to be affirmed: *And* the cause is to be remanded, to the High Court of Chancery, for further proceedings to be had therein, according to the principles of this decree.

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## RICHARDSON.

*against*

## JOHNSTON

**R**ICHARDSON'S administrators brought suit in 1795, against W. Johnston executor of Richard Johnston deceased, and declared upon a joint bond given by Charles Tinsley and the said R. Johnston to Richardson in his lifetime; dated the 4th of May 1771; and conditioned for payment by Tinsley only. The defendant plead payment; and the plaintiff took issue. Verdict and judgment for the plaintiff: Which were afterwards set aside during the same term; and the defendant withdrawing his former plea, and taking over of the bond and condition, for plea said "that the plaintiffs ought not to have their said action against him; because he saith, that the said Richard Johnston departed this life on the day of 17 the said Charles Tinsley his co-obligor being then in full life; whereby the action survived to the said Tinsley, and the said Johnston and his executors became wholly discharged

Plea allowed to be amended after a trial and verdict for the plaintiff.

Joint bond anterior to the act of 1786; the death of one obligor, before that act, discharges his executors.

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"charged therefrom: Wherefore he prays judgment &c."

The plaintiff demurred to the plea; and the defendant joined in the demurrer.

The plaintiff also filed a bill of exceptions to the court's opinion on their setting aside the verdict and judgment; which stated, "That the defendant moved to set aside the verdict, and award a new trial, for the purpose of introducing by way of amendment to his former plea of payment the fact as stated in the affidavit of James Turner hereunto annexed:" Which affidavit is in the following words, to wit: 'These are to certify that James Turner came before me the 9th day of September 1797, and made oath, that he went to the town of New-Castle to live May 1772; and that at that time Colonel Richard Johnston, late resident of the said town, was dead; and that Charles Tinsley, merchant of the said town, was then living, and to the best of his knowledge died about two years afterwards. Given under my hand the day and year above written.

JOHN BARRET.'

"Of which fact, and that the obligors to said bond were jointly and not severally bound, the defendants counsel, it is admitted by the plaintiff, was ignorant, until the trial of the cause. To which motion the plaintiffs objected, but was overruled by the Court."

The District gave judgment for the defendant upon the demurrer, and the plaintiffs appealed to this Court.

DUVAL for the appellant. The District Court ought not to have granted a new trial. The ignorance of the counsel was no cause for it; 3 *Marg.* 143. There is no more reason for allowing the new trial here, than there would be for allowing the act of limitations, or a tender after a judgment by default; because the justice of the

case

life was with the appellant, as the debt was an honest one, and the attempt is to get rid of it, by rigid rule of law. 5. *Bac.* 47. *Salk.* 647. Besides the length of time, will now afford a presumption against the bond.

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*SMITH contra.* The debt was discharged, against the executors, by the death of the co-obligor; and therefore the cause of action was entirely gone, and was consequently right, that the party should have an opportunity of shewing the death. But it appears, upon the face of the declaration, that the co-obligor was dead; and therefore it was sufficient cause to arrest the judgment. Consequently this Court, proceeding to give such judgment as the District Court ought to have given, may without regard to the bill of exceptions, arrest the judgment now, and thus put an end to the cause.

*Cur: adv: vult.*

*LYONS* Judge. Delivered the resolution of the Court to the following effect. That the plea of payment was improperly put in, by the attorney instead of pleading the discharge. That this was done through inadvertance, and for want of information. Consequently, that the Court was right in granting the new trial, and allowing the plea; which went to exonerate the defendant altogether, and the death of his testator discharged his estate, from the obligation.

Judgment Affirmed.

CUNNINGHAM

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APRIL TERM  
CUNNINGHAM  
against  
HERNDON.

If the declaration be bad, the defendant should demur, or move in arrest of judgment. But he cannot, upon the trial, object to the evidence in support of it (provided it agrees with the declaration,) merely on the ground of its insufficiency to maintain an action.

CUNNINGHAM & Co. brought debt against Herndon; and declared for that, "Whereas the said defendant on the 18th day of August 1775, at the county aforesaid, by his certain writing, acknowledged he had settled his account with William Reid of Fredericksburg, and remained indebted to him in the balance of £ 88:7 current money to be paid when he the said defendant should be thereunto required, and whereas the said William Reid on the day and year aforesaid, by his certain writing, on the said bill of settlement assigned the same to the plaintiffs by directing the said acknowledgment of the said defendant for the said £ 88:7:0 to be understood as due to the said plaintiffs for transactions, by him the said William Reid on account of them the said plaintiffs done. By reason whereof, an action hath accrued to the said plaintiffs to demand and have of the said defendant the said £ 88:7:0. Nevertheless &c. Plea *nil debet*; and issue.

Upon the trial of the cause, the plaintiffs filed a bill of exceptions which stated, that the plaintiffs offered in evidence to support the issue joined on their part, a writing in these words, 'Spottsylvania August 18th 1775. This day settled my account with Mr. William Reid merchant of Fredericksburg, and find the balance due from me to him, eighty eight pounds seven shillings current money. Witness my hand the day and year above written. Edward Herndon.'

Also a writing, by the said William Reid on the same paper as the above, in these words, "18th of August 1775. The above acknowledgment

ment of Mr. Edward Herndon for £ 88:7, is to be understood due to Messrs. William Cunningham & Co. being for transactions by me on their account, William Reid."

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Herndon.

To which the defendant, by his counsel objected; whereupon the matter being referred to the Court, they determined, that the same should not be given in evidence. Verdict and judgment for the defendant.

The plaintiffs appealed to this Court.

ROANE Judge. After stating the case proceeded thus:

I will consider the plaintiffs, on this declaration, as standing in two different characters. 1. As assignees of W. Reid. 2. As real owners of the debt sued for.

Under the first point of view, the testimony was improperly rejected; under the second, the indorsement of W. Reid was illegal testimony; and therefore rightly refused. But, in either case, the judgment rendered for the defendant is sustainable.

In the first view, the memorandum of settlement and indorsement of Reid, were proper testimony, and ought to have been admitted; because there is a substantial, if not a literal correspondence, between them and the papers described in the declaration; and if the case, made in the declaration, is not such an one as to justify a final judgment, for the plaintiff, that was not the proper time for the court to have made such a decision. But when the Inferior Court has rendered a final judgment for the defendant, if there be an incurable defect in the declaration, this court will sustain the judgment; although, at a prior time, such Inferior Court erred; to wit, in rejecting the testimony offered, at the trial.

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There is an incurable defect in the declaration, considering the plaintiffs, as suing in character of assignees. The declaration indeed avers, that Reid assigned the memorandum of settlement to the plaintiffs. But this averment does not take, from the court, their province of deciding, whether there was, in point of law, an assignment or not. And, in making this decision, the court will look into the whole statement, in the declaration. The latter part of the case stated, is a complete refutation of the former; it shews that Reid was not owner of the debt, but a mere agent of the plaintiffs; and that what the plaintiffs have termed an assignment is merely a memorandum by him, that the debt acknowledged is the property of the plaintiffs. An assignment presupposes a property in the assignor, and a recovery may be had against him on the failure of the obligor, on the ground of a debt due by him to the assignee; of which the draft, called the assignment, is an evidence. These principles were settled by the case of *M'Kee vs Davies* 2 Wash. 219; and testing the present transaction by them, the idea of an assignment is clearly refuted. It is most clear, that Reid had never had a property in this debt; never meant to transfer a debt of his own to the plaintiffs; but merely to inform the plaintiffs, that this debt was their property; and he cannot be inferred, from his memorandum to have owed the plaintiffs a sum, corresponding with the sum drawn for, but was merely their agent or factor in the whole business. If too the agent Reid should ever be sued by the appellants, in the event of the insolvency of the appellee, on the ground of a debt imported to be due by the assignment, the declaration, in this action, would be a complete bar thereto; inasmuch as it shews that no debt was due, nor can be inferred to be due, from him to the appellants, from the terms of his indorsement taken altogether.

The case, made in the declaration, shews, clearly, that there was no legal assignment of the debt

in

question; and, on this ground, judgment could never be rendered for the plaintiffs, upon this declaration.

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This view supercedes the necessity of considering, whether the paper, in question, is in fact assignable or not, under our act of Assembly. A question, upon which, I shall now pass no opinion.

Another view, under which the plaintiffs may be considered, on this declaration, is as real owners of the debt. As the latter appears to be real in the case, although in form they may perhaps enable themselves as assignees, the declaration might probably be sustained on the authority of *Byrd vs. Clarke* 2. *Wash.* 232; and on those liberal principles of decision, which disregard technical formalities, for the sake of substantial justice.

But the question still recurs, whether, in this view of the subject, the District Court did right in rejecting the testimony offered? And I am of opinion, they certainly did right, in so far as they rejected the memorandum of W. Reid. Keeping the idea of an assignment out of view, for the present, W. Reid, as to the matter of this indorsement, can only be considered as a witness; and whether his evidence was, or was not, relevant, necessary to corroborate the settlement of the appellant Herndon, it is clear that before it could be received, by the court, it ought to have been taken, under the customary sanction. This not being done, his memorandum being, in fact, a mere assertion of an individual, it was rightly considered, by the court, as inadmissible.

In either view of the case therefore, I think the judgment of the District Court was right, and that it ought to be affirmed.

FLEMING Judge. The note in question amounted to a promise; and the memorandum was

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a good assignment; to constitute which no particular words are necessary. I think therefore that the plaintiff was intitled to his action; and I am equally clear that the paper should have been given in evidence. For it is enough, if the plaintiff shews a good cause of action, and the evidence corresponds with the statement made in the declaration; which was the case in the present instance. I am therefore of opinion, that there was error in refusing the evidence; and that the judgment should be reversed, the cause sent back for a new trial, and a direction given to admit the evidence.

CARRINGTON Judge. At the stage at which the cause was in the court below, I think it was improper for the court to decide, as to the validity of the note, or of the assignment; of which there was a *proferri* in the declaration. They were the evidence declared on, and therefore the plaintiff ought to have been permitted to offer them to the jury, in support of it. Whether they would have maintained the action, if there had been a demurrer to the evidence, or a motion in arrest of judgment, is unnecessary to be now decided; as the cause had not advanced to either of those stages but its progress was prematurely arrested. In the view of the subject, the cases of *Brown vs Purvis* 1. Wash. 202, and *Wilcox vs Huggins* 2. St. 907 concerning the act of limitations, can have no application. Upon the whole I am of opinion that, as the case comes up, the District Court erred in suppressing the paper; that therefore the judgment should be reversed; and the cause sent back for a new trial, with instructions to admit the evidence; so that the plaintiff may have an opportunity of proving the note if he can.

LYONS Judge. If the declaration was bad the defendant should have demurred, or taken advantage of it by pleading. But he could not, and on the trial of the cause, object to the introduction of the evidence, if it was consistent with the declaration. If the action was not sustainable,

should

ould have demurred to the evidence, or moved  
 an arrest of judgment; but he could not prevent the  
 plaintiff from proving his declaration, by testimony,  
 which corresponded with the allegations of it.

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I concur therefore with the two judges, who are  
 for reversing the judgment; and sending the cause  
 back for a new trial, with directions to admit the  
 evidence.

The judgment was as follows:

“ The Court is of opinion, that the said judgment is erroneous in this: *That* the said Court refused to admit the writings, in the bill of exceptions stated, to go to the jury as evidence; which were proper evidence, on the issue; and the appellants ought to have been allowed to prove them. Therefore it is considered that the said judgment be reversed &c. and it is ordered, that the jurors verdict be set aside, and that a new trial be had in the cause; on which the said writings are to be allowed to go as evidence to the jury, on proof of the execution thereof.”

SKIPWITH

Rule as to  
appeals.

**I**N this case the Chancellor had made a decree at the September term 1800 upon a forthcoming bond, from which decree Skipwith appealed to this Court. The Court of Chancery allowed him for giving the appeal bond, which extended beyond the last term of this court. And it being a case for delay, Wickham for the appellee, moved to bring it on, contending that this ought to be considered as the second term after granting the appeal. For the time allowed Skipwith for giving the bond, was for his own benefit, and therefore, that he should not be permitted to take it to the disadvantage of his creditor.

But the court, after enquiring into the practice, denied the motion; being of opinion, that this ought to be considered only as the first term after the appeal.

## RANDOLPHS Ex'rs.

against

## RANDOLPHS Ex'rs.

**T**HIS was an appeal from a decree of the High Court of Chancery, where Thomas Randolph surviving executor of John Randolph deceased, brought a bill against David Meade Randolph and his co-executors of Richard Randolph deceased, stating,

That Richard Randolph, the elder, died in 1744 leaving a widow, some daughters, four sons, wit: Richard (his eldest son, and one of his executors,) Brett, Ryland and John; all of whom are since dead. That the testator devised lands and tenements of considerable value to his said sons; and being possessed of a great personal estate, and having debts outstanding, more than sufficient as supposed to pay his debts, as well as of a large tract of land in Bedford, containing upwards of 1,000 acres, *then unpatented*. He devised all the *residuum* of his estate (which included the said tract of unpatented land) to be equally divided between his said four sons.

That the said Richard, the son, qualified as executor; received the profits of a considerable part of the estate allotted to the younger sons; collected the debts due the testator; and sold the said tract of unpatented land; but never made up any account of his administration; nor did he ever account, with his brothers, for their proportion of the residuary estate, although considerable.

That the said John Randolph being very young, at the death of the testator, lived with the said Richard his brother, for many years; and some time after he came of age. That the said Richard received the rents, and profits, of his estate, furnished

An account of state transactions refused.

Especially where it appeared, that a bond was given by the plaintiffs testator to the defendants testator, after the transactions took place.



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 Randolphs.



nished him, with suitable and necessary things and probably made him advances in money.

That, on the 3d of April 1764, the said John Randolph gave the said Richard his bond, for £ 635 : 15 : 1 current money; but the plaintiff has reason to believe, that this bond did not include a full and final settlement, of all their accounts to that period; but was rather intended as an evidence of the advances made, by the said Richard to the said John; subject nevertheless to a final settlement, when the accounts of the estate of the said Richard Randolph, the elder, should be made up. For the said John Randolph having entered into an agreement, with Messrs. Capel and Ozgood Hanbury, of London, for a loan of £ 4000 sterling, the said John Randolph, out of that sum, paid the said Capel and Ozgood Hanbury, the sum of £ 960 : 13 : 6 sterling, due them from the estate of Richard Randolph, the elder, and chargeable in course, to his executor; with whose privity and approbation the same was paid; and the plaintiff has no doubt, the same was to be accounted for him, at the final settlement.

That this payment is proved by a mortgage from the said John Randolph to the said Capel and Ozgood Hanbury, dated the 22d of February 1764.

That the said John Randolph and the said Richard Randolph his brother being both dead, a will was instituted in the General Court, by David Meade Randolph a son and one of the executors of the said last named Richard Randolph, upon the bond aforesaid, which had been assigned him by his father, in his lifetime; but the plaintiff knows not for what consideration. In which suit, the said David Meade Randolph, afterwards, obtained judgment in the District Court, in April 1764 for £ 1271 : 10 : 2 and costs: Which he threatened to enforce without any deduction; although the said John Randolph never received any satisfaction for the said £ 960 : 13 : 6, paid Capel and Ozgood Hanbury as aforesaid, as the plaintiff believes.

not

or hath the said Richard Randolph's administration account ever been made up, so as to ascertain, whether any thing was due thereout, to the said John Randolph.

Randolph  
or  
Randolphs

That the plaintiff hath requested the said David Leade Randolph to account concerning the administration aforesaid; to give credit for the said £960:13:6 sterling, paid Capel and Ozgood Hanbury; and to let a full and fair settlement, of all accounts between their testators, take place. But he refuses to do so, insisting that the said sum of £1271:10:2 is not subject to any deduction, and that the said John Randolph had no sett off against the said bond; although the plaintiff alleges, that the bond having lain more than twenty years, without any claim made thereon, affords strong presumption, that some right to a discount did exist: And, as the payment, to the said Capel and Ozgood Hanbury, was made, some years subsequent to the date of the said bond, and to discharge a debt properly payable by the said Richard in his character of executor, out of the estate of his testator, which was amply sufficient for the purpose; as the account of his administration had never been made up; and as the receipt granted to the said John Randolph, for the money paid to the said Hanbury's expressses (as the plaintiff hath been informed and believes) that it was to discharge a debt due from the estate of Richard Randolph, the elder, and was subsequent, in date, to the bond, the plaintiff has no doubt but that some such settlement, as above mentioned, was to have been made between the said John and Richard; which might have been prevented by the death of John, and the succeeding confusion occasioned by the war; and might have been further interrupted by misplacing of the receipt, the existence of which the plaintiff doubts not, and trusts he shall be able to prove, as well as the payment of the said £960:13:6 sterling in manner above mentioned.

The

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The bill therefore prays a full answer to the premises, interrogates the defendant David Randolph, as to the consideration of the said bond the payment of the said £ 960 : 13 : 6 sterling, and the consideration of the assignment to himself: likewise prays a full settlement, of all accounts between the said John and Richard, as well those of a private nature, as those which may relate to the estate of Richard Randolph the elder: that credit may be allowed the said John Randolph, for the said £ 960 : 13 : 6 sterling, with interest from the time of payment: that the defendants may make up an account of their testators administration, on the estate of the said Richard Randolph the elder, and credit be allowed the said John Randolph for his proportion of the residuary estate if any; that the said David Meade Randolph may be enjoined from further proceedings, on his judgment; and for general relief.

To this bill Jerman Baker made an affidavit: "That some time previous to the late war, about the year 1774; he thinks he was appointed, by an order of Henrico Court, a commissioner to examine the account of the administration of Richard Randolph upon the estate of his father Richard Randolph the elder. Progress was made in the settlement; but in consequence of the interruption occasioned by the war, the same was not finished; nor doth he believe, that an account of the administration aforesaid was ever made up, and rendered by the said Richard Randolph; nor any settlement made with his Brothers Brett, Ryland and John, who were interested in the estate of Richard Randolph the elder."

The answer of David Meade Randolph states That the said Richard Randolph his father, a little before his death (in consequence of the defendant having been his security for several sums, and also for his administration of Ryland Randolph's estate, and having also paid for him £

assigned

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signed the said bond to the defendant, on the 31<sup>st</sup> of March 1785, to the use, expressed in the assignment, but the same was intended as an indemnity to the defendant for his suretyships and advance aforesaid. That his father was executor, and he believes sole acting executor of the said Richard Randolph the elder; but believes the said John was entitled to nothing or very little, as one of the residuary legatees, for the defendant has often heard his father say, that after the testators debts were paid, there was nothing to divide; except a debt due from Colonel R. Bland and from his brother Brett Randolph, the amount of which the defendant does not know, but the same were never received. That the defendant knows not whether the Bedford lands were ever patented, or sold by his father; in short he knows nothing about them; but when the defendant was in that county he understood they were barren, and not worth 6d, per acre. That the said John lived with the defendant's father, until his marriage; which was some time after he came of age. That he was an expensive young man, and the testator furnished him with very large sums of money from time to time; and imported goods for him, to a great amount, from year to year, as appears by the annexed account, from the books of the said Richard; and by which, in 1702, there was a balance due the testator of 645:15:7. That the said account is carried down to 1769, when the balance due was £ 641; 13 11<sup>1</sup>/<sub>4</sub> and, by inspecting the account; it appears, that the said Richard continued to make advances to him, and has credited him for considerable sums, but the balance almost always continuing nearly the amount of the bond. That it is probable the said Richard never may have made up any account of his administration, on the estate of the said Richard the elder; but the said John, who had attained his age of 21 years, some time before the bond was given, never would have entered into it, if he had not been satisfied that his brother Richard, as executor of

his

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his father, owed him nothing; and at this distance of time a Court of Equity will presume so, unless there was any suggestion, or proof of undue influence; for which there is not the smallest ground, either from the character, or conduct of the said Richard. That, although, the estates, devised the said John, were considerable, yet it is well known that Virginia estates, at a distance are not profitable; that the said Richard's under his own eye were not so; and it is probable, that the expences of the said John were more than the profits of his estate. That as to the length of time, which elapsed after the date of the bond, before any steps were taken, with respect thereto, it was to be observed, that the said John was the brother of the said Richard; who always had an aversion to quarrel, as well as to bring suit against his brother. Besides eight, or nine years of the time were during the war; near six of which are, by the act of Assembly, but one day; so that no conclusive argument is to be drawn, from the length of time. That, instead of a deduction for the £ 960: 13: 6 sterling, the defendant is advised a contrary conclusion ought to be drawn; because the said John Randolph must, at the time of executing the said mortgage, have been, at least, 26 or 27 years of age; had been some years married, and must have known, whether it was incumbent, on him, to have secured that sum, to the Hanbury's, and therefore took upon himself to pay the amount of his fathers debt to the house? Which assertion is corroborated by an account from the house of John Hanbury and company dated in 175 ; by which, there was then due to the said house, a balance of £ 493: 10: 8 from the estate of the said John, arising as the defendant presumes for necessaries imported for the use of his estate; and it cannot be presumed, that the said John would have given his bond for £ 600, if nothing was due from him; and afterwards mortgaged his estate, for upwards of £ 900 sterling, if not due also. That the facts, stated in the bill, appear to be the suggestions of  
 Jerman

**Jerman Baker**; who knew a great deal of the transactions between the said John and Richard; and to whom the defendant shewed the bond before he brought suit. That Baker looked at it for some time, as if endeavouring to recollect the transaction, and then observed, that he was satisfied the money was due, and must be paid; or words to that effect.

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vs  
Randolph.

In June 1796 general replication and commissions;

In January 1797 the cause was set for hearing.

There is, in the record, a copy of the will of **Richard Randolph**, the elder, dated the 18th of December 1747; and proved, and recorded in June 1749.

There is also a copy of the mortgage from **John Randolph** to the **Hanbury's**, dated the 22d of February 1768. Which reciting, that, "Whereas the said **Capel** and **Ozgood Hanbury** have agreed and undertaken to advance and lend unto the said **John Randolph**, the sum of four thousand pounds sterling money of Great Britain (including the sum of fifteen hundred and seventy four pounds, six shillings and six pence sterling money, due from **Ryland Randolph Esquire**, to the said **Capel** and **Ozgood Hanbury**; and also the sum of nine hundred and sixty pounds thirteen shillings and six pence sterling money to them due, from the estate of **Richard Randolph** of the county of **Henrico Esquire**, deceased." Proceeds thus, "Now this indenture witnesseth, that for and in consideration of the said agreement, and also in consideration of the sum of twenty shillings to the said **John Randolph** by the said **Capel** and **Ozgood Hanbury** in hand paid &c." It was re-acknowledged in October 1768, and again in November 1768. In May 1768, it was recorded, in the General Court.

The last account spoken of, in the answer, is in these words;

"Dr.

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"Dr. The estate of Col. Richard Randolph's  
account of John Randolph. Cr.

1751 To balance of John Randolph's } 493 10  
May account then sent him.

To interest from said date till paid.

(E. E.) J. HANBURY, & Co.

February 20th, 1752."

In March 1799, the Court of Chancery, upon a hearing, dismissed the bill, with costs. From which decree, the plaintiff appealed to this court.

RANDOLPH for the appellant. It does not appear that there ever was a settlement of the executors and guardians accounts; which ought to have been done, as there was a large body of lands, and a considerable residuary estate appropriated to the purpose, of paying the testators debts; which must not only have been sufficient for that purpose, but probably left a surplus. Added to which, the profits, of John Randolph's own estate, must have been very great, during his long minority; and it ought to be shewn, how they were disposed of. Besides the great payment made to the Hanburys, on account of the estate, several years after the bond was given, entitled the plaintiff to a discount for that sum; and ought to have been so applied. At least a further opportunity, of enquiring into the matter, ought to have been afforded the plaintiff, by sending the cause to account, before a commissioner. The antiquity of the bond, moreover, affords a strong presumption, of its being satisfied. Otherwise, it is not easy to conceive, why it was suffered to remain, so long, without payment having been enforced, or even demanded. The account in the record related to another John Randolph, and not to this John Randolph; who, on account of his tender years, could have had no account against him.

Call

**CALL and WICKHAM contra.** An account would have been improper, after so great a distance of time, when the circumstances must all have been forgotten, and the evidences lost. For as on the one hand the payments cannot be known, so on the other, the property, debts and transactions, must have escaped all recollection: Inasmuch, that perhaps the delivery of a single slave, or any other article could not now be shewn. The Court therefore will not, at this day, indulge an inquiry into such stale matters; 4 *Bro. cb. rep.* 258. Which rule expressly applies. For here the testator has died, and by, and suffered the estate to be distributed, and then the appellant, in the language of the judge here, comes forward to demand an account, after the right has been so long *stept* on, of transactions originating above half a century ago. The granting of which request would expose the appellee to every possible inconvenience. But the bond is a presumption of a settlement, until the contrary is shewn; and the long acquiescence afterwards confirms the presumption; especially as the mortgage, itself, would have been an incitement to demand it. Added to which, Richard Randolph, whose character is not impeached, assigned this bond to his own son as a security, and it is not probable, that he would have done so, if he had not considered it as actually due. The mortgage was a transaction between John Randolph and the Hanburys; and therefore, strictly speaking, is no evidence against Richard Randolph: But allowing it the fullest force, yet it was probably no more than John Randolphs own share of the debt due from the estate; and although the mortgage states it as money *borrowed*, that was merely the mistake of the writer, and proves nothing. Besides the bond is due to Richard Randolph in his own right, and the sum, mentioned in the mortgage, was a debt due from the estate. So that the mortgage could not form a proper discount against the bond. The uncertainty, in all these matters, is alone suf-

Randolphs

vs  
Randolphs,

ficient



Randolph  
vs  
Randolph.  
*Wm. Randolph*

sufficient, to repel the application for an account because it proves how unsatisfactory the enquiry must be, and to what difficulties it would expose the parties against whom it is prayed. The antiquity of the bond was a proper subject for the consideration of the jury; and they have decided it in favor of the creditor. Besides the delay, to sue upon the bond, is accounted for, by the answer, and was owing to the family connection, and the friendship between the brothers.

RANDOLPH in reply. If the appellee would be under any difficulties in taking the account, it is the fault of his own testator; who ought to have come to a settlement, at an earlier period. But as it is not stated that any vouchers are lost, it does not appear that there would be any inconvenience in taking the account. If it were true, that the bond was given for transactions between John Randolph and Richard Randolph, yet the debt, taken up by the mortgage, was more than sufficient to pay it, and ought so to be applied. The case from 4. Bro. instead of repelling the application for an account, contains principles expressly proving our right to it.

HAY on the same side. Insisted, that it was plainly to be inferred, from the whole complexion of the case, that the bond was given on account of transactions relating to the estate; and if so, then that the mortgage was a clear satisfaction of it.

*Cur. adv. vult.*

LYONS Judge. Delivered the resolution of the Court. That there was no error in the decree; and therefore that it was to be affirmed.

Decree Affirmed.

FIELD

## FIELD

against

## CULBREATH.

FIELD filed a *caveat* in the Land Office against any patent issuing to Culbreath. Which caveat is in these words: "Let no patent issue to Thomas Culbreath, for thirty eight, and a quarter acres of land, surveyed for him the thirtieth day of October one thousand seven hundred and eighty eight, by John Holloway, assistant to Samuel Deßman surveyor of Mecklenburg county, and bounded according to the said survey as follows: Beginning at a white oak on Grassy creek, from thence, North thirty nine degrees East sixty six poles to corner pointers in John Clark's line, from thence, South eight degrees East one hundred and eighty four poles to Williams's corner post oak in Thomas Field's line, from thence, North eighty three degrees West fifty six poles to a maple on Grassy creek, thence down the same, as it meanders, to the beginning: And now caveated, and claimed by Thomas Field, of the said county of Mecklenburg, for the following reasons:

"First, because all the land contained in the said survey and plot is the proper estate of the said Thomas Field in fee simple, and is included within his ancient and known lines, duly processioned, and in quiet and peaceable possession of the said Thomas Field, and those whose estate he hath and claimeth under the devise of his late father Theophilus Field deceased, in his last will and testament, for the space of fifty years last past, appropriated and occupied, with a visible personal property thereon of sufficient value to pay and discharge all the quitrents and land taxes, wherewith the same was ever chargeable.

In 1788 C. located a land office treasury warrant, issued 29th Nov. 1783, on lands on the Eastern waters; F. (who upon the trial, did not prove any title, in himself, to the lands located) entered a caveat, in the land office, against a patent to C. The District Court gave judgment in favor of C. and this Court affirmed it.

What is a good Entry.

Secondly

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Culbreath.

Secondly, because all quitrents and land tax  
" ever due upon the said land, have been de  
" and regularly paid by the said Thomas Field  
" and his predecessors in the freehold; agreed  
" to the quantity expressed in the old surveys and  
" grants,

" Thirdly, because the said Thomas Field, was  
" in actual possession of the said land, at the time  
" the said survey:

" And fourthly, because the said survey and  
" plott, and the record and return thereof are  
" regular, improper and contrary to law."

At Mecklenburg County Court November 1783  
a jury were impaneled, *to find such facts as are material to the cause, and not agreed by the parties.*  
The record then states, that " It appearing to  
" the Court, that the warrant, under which the  
" defendant claims, issued previous to an act of  
" Assembly passed in the year one thousand seven  
" hundred and eighty five, directing the manner  
" of obtaining rights to unappropriated lands, on  
" the eastern waters, and the survey aforesaid  
" made in consequence of an entry by the said  
" warrant, and that the said defendant has no  
" right to a grant by virtue of the said survey un  
" der the said warrant: Therefore it is consider  
" ed that a grant issue to the plaintiff for the said  
" lands, upon his complying with the laws in such  
" cases made, and that he recover against the de  
" fendant his costs."

The defendant filed a bill of exceptions to the foregoing opinion of the Court; which stated, that the defendant offered in evidence to the jury a Land-Office Treasury Warrant, dated the 29th of November 1783, issued to Daniel Carter for 300 acres due him, in consideration of £ 480 current money paid into the public Treasury. And assigned by Carter to Harper; and by him to Samuel Dedman: Who assigned two hundred acres thereof to Mitchell; and likewise indorsed that

he

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had surveyed 38½ acres of the warrant for Culbreath. That the defendant also offered in evidence an entry in the following words: "April 8th 1788 Thomas Culbreath enters, by Land Office Treasury Warrant No. 20,900, granted Daniel Carter, and dated the 29th day of November 1783, for all the vacant land, between the lines of John Clark, Thomas Field, James Williams, and William Culbreath deceased." That he also offered in evidence a survey, which begins at a corner White Oak on Grassy creek, thence to corner pointers in John Clarks line, thence to Williams' corner post Oak in T Fields line, Thence to a Maple on Grassy creek, thence down the same, as it meanders, to the beginning. That the plaintiff prayed judgment of the Court, because the defendant had located the said warrant on lands lying in Mecklenburg county, and not on the western waters, on which, alone the plaintiff insisted the defendant had a right to locate the said warrant, since the said act of 1783; and that the Court was of that opinion. The defendant prayed an appeal, which was refused by the Court.

The District Court granted a writ of superseadeas to the judgment; which they reversed (because there were no facts found by the jury, nor were the jury discharged) and retained the cause for further proceedings. At a future court, it was sent to the rules, for an issue to be made up. Which order, at another court, was set aside, on the plaintiffs motion, and the cause put upon the issue docket.

In May 1797 a jury were charged, *to find such facts as are material to the cause, not agreed by the parties:* Who found a verdict in these words:

"We of the jury find the land warrant in these words, to wit: (setting it forth) We also find the following assignments on the back of the said warrant (setting them forth as above.) We also find, that the said Thomas Culbreath came possessed

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vs.  
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" possessed of the said land warrant, in a short time  
 " after the said last assignment above written.  
 " the back of the warrant aforesaid. We likewise  
 " find the testament and last will of Theophilus  
 " Field deceased, in these words, referring to  
 " generally, but particularly stating the following  
 " clause. 'Item I give and devise to my son  
 " Thomas Field and to his heirs forever the several  
 " tracts and quantities of lands, to wit: A  
 " my lands and plantations on Grassy creek, on  
 " the South side of Roanoke river, containing 289  
 " acres; of which 404 I formerly took up, 230  
 " I bought of John Hood, 36 of John Bressie, and  
 " 158 acres thereof I lately took up; also the land  
 " and plantation on the North side of Roanoke  
 " river, I bought of Thomas and John Satter  
 " White, containing 400 acres,) 'That a woman  
 " had built a log house on the said  $38\frac{1}{2}$  acres of  
 " land, surveyed, as aforesaid, for the said Thomas  
 " Culbreath, and dwelt on the said  $38\frac{1}{2}$  acres  
 " of land, for eighteen years, or thereabouts.  
 " We further find, that Lemuel Wilton attended  
 " the processioning of the lines of the said Thomas  
 " Field and others twenty odd years ago, when  
 " the said Thomas Field informed him the said  
 " Williams, that the creek was the line, tho' he  
 " knew there was an old line across a place called  
 " the Mountain, and further, that James Williams  
 " attended the processioning of the lands of  
 " the said Thomas Field and others, three or four  
 " times, at which times the said line across the  
 " mountain aforesaid was marked as the line of  
 " the said Thomas Field, and that the said  $38\frac{1}{2}$   
 " acres of land was considered as vacant and un-  
 " appropriated land; but was informed, by the  
 " said Thomas Field, that he had an order of  
 " counsel for the same. And we further state,  
 " that the said  $38\frac{1}{2}$  acres of land was vacant and  
 " unappropriated land, and not included in the an-  
 " cient boundaries of the said Thomas Field, at  
 " the time the entry was made by the said Tho-  
 " mas Culbreath."

Upon

Upon this verdict, the District Court gave judgment for the defendant; and Field appealed to this court.

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**CALL** for the appellant. By the act of 1785 *chap. 42* a different land warrant was necessary, for the Legislature, by the that act clearly intended, that no lands upon the Eastern waters should be granted, after the passage of that law, upon any other terms, than those mentioned in it. Because by prescribing a particular mode, they hereby necessarily excluded every other; and because too, by the last clause they, in express words except two cases from the operation of the statute. 1. Cases where a location had been already begun prior to the passing of the act? 2. Cases of preemption rights to marshes and sunken grounds. Which obviously excludes the right of commencing an entry, under any former warrant. For by declaring the warrant good, where the entry was begun, or it was a case of preemption rights, they manifest their intention, that it should not not be so, where the entry was not begun, or it was not a case of preemption rights. Again the object of the law was to provide a fund to aid the discharge of the public debt due to foreigners, which object would be utterly defeated, upon any other construction of the act. Because then the old warrants would all have been bought for locations upon the Eastern waters, at a less price, than the public would sell new ones for; but greater, than the price of warrants for lands, on the Western waters. So that the individual holders would be enriched, but the public purse would remain as empty as before the passage of the law. Which would have wholly disappointed the views of the Legislature. For the Eastern lands would still have continued to be located on the ancient terms, and new warrants would only have been taken out, for those on the Western waters.

It cannot be said, that the construction now contended for, would give the act an *ex post facto* operation, which would be prejudicial to the hold-

ers

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ers of the old warrants, whose former rights would be thereby divested or circumscribed. Because they may still lay them on the western waters, thus have full satisfaction for the claim. So the public faith is not violated towards them. Besides the warrant itself did not give them a right to any lands in particular, until they had made a location. It was only a right to locate them on unappropriated land; which they might never exercise; and therefore could acquire no right to land, either on the Eastern or Western waters, until a location was made. Which is the first conception of a right to lands in any particular part of the state. *Walcott vs Swan*\* in this Case. Therefore the warrant only gives a privilege of locating them on any waste and unappropriated lands, at the time of the proposed entry. For every term *unappropriated* means not applied or set aside for, any particular use or purpose. But if a particular parcel is declared ungranted or specifically appropriated, before the holder exercised the privilege, he can no more compete than if an individual had made a location before him. The only difference is, that it is an individual who appropriates, instead of the public; but the public has as much right to do so, as the individual. Now, in the present case, the public have appropriated the lands, on the Eastern waters, to a particular purpose, prior to the exercise of the right under the old warrant; which only gave the holder a right to locate it on unappropriated lands: A term not applicable to the lands in question, at the time of the location. But as the warrant only gave them a right to locate it on *unappropriated* land, that necessarily supposed a right in government to appropriate, and the Legislature have done so, with regard to the lands on the Eastern waters, by creating them into an auxiliary fund for the payment of the foreign debt. A contrary construction would defeat the

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\* Antc. 298

Pick  
vs  
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the act of May 1780, which declares that common  
c. upon the Eastern waters, should not be grant-  
able in future; although the act admits they were  
, before the passage thereof. Which is only  
justifiable, on the ground of argument now assum-  
ed; namely, that they were previously appropri-  
ated before any attempt to locate. In fine, no  
location having been made before the act, no in-  
justice is done the holder; who may still have sa-  
tisfaction for his warrant on the Western waters,  
and the meaning of all the laws be preserved.  
Whilst the contrary construction would wholly de-  
stroy them.

But if the warrant were good, the entry is too  
vague and uncertain. For it has no beginning,  
it ought to have: Nor does it ascertain the  
lands with convenient precision, according to the  
case of *Hunter vs Hall* \* in this court. For it  
does not appear, that the lines, described in the  
entry, do include the lands in question, upon all  
sides; and, in point of fact, when the survey came  
to be made, not more than two of the lines, de-  
scribed in the entry, corresponded with those men-  
tioned in the survey. So that the entry may have  
comprehended a great extent of country, and much  
beyond the quantity contained in the warrant;  
which was his only authority to locate at all. For  
location without a warrant in possession is actu-  
ally void.

WICKHAM for the appellee. The question is,  
whether the caveat shall be sustained? Which can  
only be, where the party who caveats has a better  
right himself, than the person applying for the pa-  
tent; for as to the point, whether the warrant is  
sufficient to entitle the holder to locate on the eas-  
tern waters, that is a matter purely for the con-  
sideration of the Register; who will refuse the pa-  
tent if wrong, and grant it, if right. In the pre-  
sent

\* 1. Call's Rep. 206.



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sent case, Field shews no title; and therefore has no right to prevent a patent, from issuing another. No injury results from this doctrine because the Commonwealth will not be bound by the dismissal of the caveat. The act of 1785 does not take away the right, to locate prior warrants on the eastern waters. It does not do it in express words; and the tenor of the law is prospective. The Legislature did not mean to take away a vested right, from the holder. The case of commons &c. stands upon the same grounds as public roads, mill-dams, and other public conveniences. The land warrant was a contract, allowing the holder to locate on any unappropriated lands; and therefore any extraordinary attempt, by the Legislature, to diminish the objects of location, would have been a breach of the public faith. The entry was sufficiently certain. For it is for all vacant lands lying within certain boundaries. Which supercedes the necessity of a beginning; and that is only requisite, where there are surrounding, unappropriated lands. A caveat is like a declaration; it states facts, and the grounds of objection. But here, if it were even true, that a person having no title himself might caveat another's patent, the appellant has not stated, that the warrant could not be located on the eastern waters, or that the entry was defective.

CALL in reply. Any person, whether interested or not, may prevent a patent from issuing to a person not having title to one, in order to prevent imposition on the public; and, if nothing of this kind be done in the Register's Office, the courts, as guardians of the public rights, would ex officio interpose, where it plainly appeared, that a party was endeavouring to procure a patent, contrary to law. For although such a patent would be void against a future locator, yet no person would willingly involve himself in a law suit with another, who was in possession, under a patent issued by the proper authority. The question

not,

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st, whether the Legislature could prevent the holders of old warrants, from locating them on the western waters, but whether they have not specially appropriated those lands? For if so, no jury is done the holders, who may still locate them on any unappropriated lands. The entry altogether uncertain. A beginning was clearly necessary, according to the appellees own argument. For it does not appear, that there was no surrounding unappropriated lands, but the contrary; inasmuch as the lines, described in the entry, do not agree with those in the survey. So that it does not appear, that the entry comprizes no more land than is contained in the survey.

*Per: Cur.* Affirm the judgment of the District Court.

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H Y E R S & al.

*against*

G R E E N.

JAMES GREEN brought a writ of right in the County Court of Hardy, against Leonard Myers, John Hyers, Lewis Hyers, Martin Shobe, Rudolph Shobe, Martin Powers, Jacob Shobe, Christopher Ermontrout, Martin Shobe, jr. Abram Stooky, Modlin Stooky and Conrad Carr, for His fourth undivided part of one tenement, containing eleven hundred and twenty acres of land with the appurtenances in the county aforesaid, late the county of Augusta, on the South branch of Potowmack river, and bounded as followeth, to wit: Beginning at two red oaks, on the South side the North fork of the said branch, thence S. 28 W. 106 poles to a black walnut, white oak and Elm, on a branch at the foot of a hill, thence N. 74 W. 400 poles to a red oak,  
“ at

In a demurrer to evidence all the testimony on both sides ought to be inserted.

*Quere:* If non tenure may be given in evidence in a writ of right, where the mise is joined on the mere right?

Hyers  
or  
Green.

"at the foot of a hill, thence N. 57 W. 248 poles  
"to a white oak, on a hill, thence S. 52 W. 12  
"poles to a white oak, thence N. 80 W. 48 poles  
"to two white oaks, thence N. 49 W. 100 poles  
"thence N. 15 W. 40 poles to a sugar tree and  
"hickory on the said branch, thence down the se-  
"veral courses of the same to the beginning."

The *mise* was joined, by the parties, upon the  
mere right, according to the form of the act of As-  
sembly.

There is a deed from Lord Fairfax to Jacob  
Stooky for three lives dated 3d August 1773. Ano-  
ther of the same date to Leonard Hyers for 223  
acres. Another of the same date to Martin Shobe  
for 89 acres. Another of the same date to Mar-  
tin Shobe for 211 acres. Another of the same  
date to Martin Powers for 130 acres. Another  
of the same date to Christopher Ermontrout for  
167 acres. Another of the same date to Barbara  
Shobe for 177 acres. And another of the same date  
to Jacob Shobe for 97 acres.

There is a patent to Robert Green for 1120  
acres dated 12th January 1746.

There is a copy of the said Robert Green's will  
dated 22d of February 1747. In which is the fol-  
lowing clause, to wit: "I give and bequeath un-  
"to my said sons James and Moses Green and  
"their heirs and assigns forever, one half of a tract  
"of land, containing two thousand acres, lying  
"in Augusta county, between the Shenandoah,  
"and the Peaked Mountain; and my will is, that  
"the said lands bequeathed to my said sons James  
"and Moses Green shall be equally divided be-  
"tween them, at the discretion of my executors."

There is a survey of the lands demanded, made  
by order of the court, which states them to be  
situated, as follows: "Beginning in the river  
"where the corner was supposed to have stood,  
"running across the bottom S. 25 W. 106 poles

"to

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to a small branch between the foot of two hills, old deed calling for a black walnut, white oak and elm, no mark to be found, the timber much cut, thence N. 77 W. 400 poles to the top of a knole, no mark found, the old deed calling for a red oak at the foot of the hill, timber very little cut, thence N. 60 W. 248 poles to the top of the hill by Martin Jobs orchard, old deed calling for a white oak, no mark, timber much cut about there, thence S. 49 W. 160 poles, old deed calling for a white oak, no mark found, timber not cut, thence N. 83 W. 48 poles into Conrad Carr's meadow, no mark found, old deed calling for two white oaks, timber all cut down, thence N. 52 W. 100 poles, old deed calls for no tree, thence N. 18 W. 6 poles to the river, old deed calling for 40 poles in this course and a sugar tree and hicory on the bank of the river, no mark found, the timber not much cut, only a road on the bank, thence down the several meanders of the river to beginning, containing one thousand and fifty acres."

Upon the trial of the cause, the demandant filed a bill of exceptions to the courts opinion, which stated, that the demandant tendered a demurrer to the evidence, in these words, "the tenants in these causes gave in evidence the following leases, (naming them in the order above mentioned,) and they and those to whom the said leases were given, under whom they claim, have been in possession twenty two years under the above-mentioned leases, and twenty years previous, that upper part of the land demanded by the demandant in his declaration, lies one mile below the confluence of the North fork, and the South branch, and on the side opposite from the North fork; and the demandants further proved by Philip Paul Yoakum the lands whereon the aforesaid Leonard Hyers, and others now live, (being the lands in dispute,) do lay on the South branch of Potowmack, and that he has resided in this county about fifty years, and never knew

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" said river called by any other name, and that  
 " the said lands lay some distance below the mouth  
 " of the north fork and on the opposite side of the  
 " South branch river. And by Jonathan Head  
 " that he was summoned by the sheriff of Hardy  
 " county, to attend the surveying a tract of land  
 " being the lands in dispute between the parties  
 " aforesaid, whereon said Leonard Hyers and  
 " others now live; where was present, Colonel  
 " Joseph Nevill and John Foley surveyors. They  
 " begun said survey about two and one half chains  
 " in the South branch of Potowmack about four  
 " miles below the mouth of the North fork, near  
 " to where fort George formerly stood, the first  
 " course extended eleven poles up a run, between  
 " two hills, the second course crossed the point of  
 " a hill which was not passable; they measured  
 " back on the first course, into the bottom, to en-  
 " able them to run the second course. The se-  
 " cond course, as the surveyor then run, was on  
 " the point of a hill, where there was no timber  
 " cut, at the third corner, there was but little tim-  
 " ber, the fourth corner, no timber cut, the fifth  
 " corner, cleared, the sixth corner no timber cut,  
 " at the seventh corner, no timber cut, except a  
 " road along the river, the last course calls for  
 " forty poles but found only six, when we came  
 " to the river, which if they had extended agree-  
 " able to the deed, would have carried them over  
 " the South branch into a pine hill, they then  
 " took down the different meanders of the river to  
 " the beginning, that they diligently examined the  
 " different courses, but found no corner tree, nor  
 " side mark, that there was an allowance made of  
 " two and one half degrees variation. And fur-  
 " ther proved by Michael Lee, that he has resid-  
 " ed in this county fifty years, that the north fork  
 " enters into the South branch about a mile and  
 " a quarter above the upper end of the land in dis-  
 " pute, that the South fork of the said river emp-  
 " ties into the South branch, about eleven miles  
 " below the said land. And further proved by

" Job

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Job Walton, that he was summoned by the sheriff of this county, to attend a survey on the lands in dispute, and that they began the first course of the survey about the middle of the South branch where fort George formerly stood, that they run the first course, about eleven rods up a run between two hills, where the timber was chiefly cut, they then started on the second course, and run some distance when they came to a steep bank which they could not go down; they measured back on the first course into the bottom, to enable them to run the second course. The second course as the surveyor then run was on the point of a hill where there was no timber cut, at the third corner, there was but little timber, the fourth corner, no timber cut, the fifth corner cleared, at the sixth corner no timber cut, at the seventh corner no timber cut, except a road along the river, the last course called for forty poles, but found only six, when we came to the river they then took down the different meanders of the river, to the beginning, that they diligently examined the different corners, but found no corner tree, nor side mark, that there was an allowance of two degrees and an half in the variation, and that he was present when Asleby run out the land in 1773. When no marks, line trees, or corners, could be discovered. To which evidence the demandant by his counsel demurred as insufficient in law, to support the right of the tenants to the land in contest, and produced in support of his right a copy of a patent duly attested as the law directs, from his late Majesty George the second, king of Great Britain; in the words and figures following George the second &c. and the act of Assembly passed in the year 1748, entitled, An act for confirming the grants made by his Majesty, within the bounds of the Northern Neck, as they are now established; and also a copy of the last will and testament of Robert Green deceased, authenticated under the seal of

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"Orange county, where the same was admitted;  
"record, in the words following to wit: In the  
"name &c. and prays the Judgment of the Court  
"whether he has more right to the tenements  
"which he demandeth against them, or they  
"hold it, as they demand it."

That the court refused to permit the demurrer to be filed.

Verdict and judgment for the tenants; upon which the demandant appealed to the District Court.

The District Court was of opinion, that the judgment was erroneous, in this, "that the court below ought not to have admitted the evidence stated on the part of the tenants as mentioned in the demandants bill of exceptions to have gone as evidence to the jury; and in not receiving the demurrer of the said demandant." That court therefore reversed the judgment; and thereupon the tenants appealed to this court.

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CALL for the appellant. A demurrer to evidence should be capable of being reduced to so much certainty, that the court may ascertain the fact; and although the court may presume every thing against the party tendering the demurrer, they cannot presume any thing against the other party. For it would be absurd to oblige a man to admit, what he denies. But, in the present case, neither do the lands claimed agree with those described in the count; nor does it appear, that the demandant was entitled, under the will of Robert Green. For it is not shewn, that the plaintiff is the person to whom the lands are devised; which it was necessary for the demandant to have done; because that was the foundation of his title. It would have been clearly so in a special verdict, or in pleading; and as strict a rule, at least, ought to obtain against the party tendering a demurrer; who, by drawing the cause, from the jury to the court, and thus preventing an ascertainment of

facts

As by the count, ~~it~~ takes upon himself, to state complete title.

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WILLIAMS for the appellee. The demandant ought demur to the tenants evidence. *Trials per* *jur.* And this upon principle; for the evidence begins with the tenant. *Booths real act.* 98; and therefore, if insufficient, the demandant may refer to the judgment of the court. The evidence there did not go to shew, that the tenants had more right, than the demandant; for it is evident, the whole matter, that ours was the better title. The tenants could not be permitted to prove, that the land claimed was different, from that described in the count. For *non tenure* is a plea in abatement; and cannot be given in evidence, where a misfe is joined upon the mere right. The act of 1786 will not be considered, as making any difference; for that only permits any thing to be given in evidence, that might have been specially pleaded; which means any thing, that might have been plead in bar, and not abatement. *Non tenure* is not only considered as a plea in abatement, by the common law, but the act of 1748 *Chap. I. §. 1*, treats in it the same manner. With respect to the certainty of the person demanding the land, is sufficiently shewn: For James Green is the person named in the will; and James Green is the person, who brings the suit. Upon the whole, therefore, the court below ought to have compelled the tenants, to join in the demurrer.

WICKHAM on the same side. The demurrer ought to have been received. For the uncertainty, spoken of, related only to non tenure, and the identity of the lands; which were mere matter of abatement, both at common law, and by the act of 1748. But it has been, already, properly shewn, that the act of 1786 does not alter the law, in that respect. For it clearly means pleas in bar, and not in abatement: Like the ordinary case of the general issue, with leave to give the special matter



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matter in evidence; which means evidence relevant, and suited to the case. The count states certain bounds, and the tenants defend those bounds; it would therefore be strange, to allow them to deny the very bounds, which they professed to defend. That would be both to admit and deny, the identity; which would be absurd. But certainty to a common intent is sufficient, as well in special verdicts, as in demurrers to evidence; and there was a certainty to a common intent, in the present case.

RANDOLPH in reply. The act of 1786 permits every thing to be given in evidence, which might have been specially pleaded; and non tenure, or any other matter in abatement, might be specially pleaded, as well as matter in bar. At common law, every thing might be given in evidence, but collateral warranty; *Booth. real act.* 98: According to which doctrine, non tenure might have been given in evidence, before the act of 1786, although the mise was joined on the mere right. Besides, non tenure may be pleaded, either, in bar or abatement. 1. *Mod.* 294, 214. 1. *Bac.* 12. The act of 1748 only relates to process, and cannot affect that of 1786. There was no point of law in the case; and therefore the demurrer was improper. No evidence is offered to shew, that the demandant was the devisee; and therefore the court cannot infer it.

WICKHAM. Non tenure could not be given in evidence; for the judgment would be a bar, and the demandant liable to be surprized. The 1. *Mod.* 214 does not prove, that it may be plead in bar; the distinction taken there, by *Burrell*, expressly proves the contrary. There were questions of law, in this case, arising upon patents, acts of Assembly, wills, &c. which rendered a demurrer proper.

RANDOLPH. The judgment would not be a bar in a suit for other lands; because the demurrer would shew, that they were not the same.

This

This term the court, desired the point, whether in a demurrer to evidence it was necessary to state all the evidence on both sides, to be spoken to by counsel.

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**CALL** for the appellant. It is absolutely necessary, both on principle and authority, that, in a demurrer to evidence, all the testimony, on both sides, should be stated.

### I. Upon principle:

There is a strict analogy, between a demurrer to evidence, and a demurrer to pleadings. Both are governed by the same principles: In each the plaintiff must shew a good title, against a weak defence: And the defendant must either shew, that no title is set forth by the plaintiff; or he must oppose a good defence, to the good title, alledged by the plaintiff.

Hence it follows, that, although the defendant may some times demur to the plaintiffs evidence, without shewing any, on his own part, as where the evidence, adduced by the plaintiff, renders it unnecessary, for the defendant to produce any on his part, yet the plaintiff never can demur to the defendants evidence, without setting forth his own; because he must shew a good title in himself to recover, or the weakness of the defendants title is of no consequence. For he is to recover upon the strength of his own, and not upon the weakness of his adversary's title.

The end of all pleadings, and a demurrer to evidence is a species of pleading, is to bring the points, in controversy, fairly before the court.

Therefore as the plaintiff in his declaration must set forth a good title, or the defendant may demur, without alledging any other matter of defence; since it is immaterial whether the defendant has a title or not, provided the plaintiff has none: So the plaintiff must prove a good title, or the defendant may demur to his evidence, and  
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pray judgment on account of its insufficiency, without offering any new matter upon his own part; for it would be useless to bring forward testimony to avoid a title, which is not shewn to exist.

It results from all this, that it is absolutely necessary, that it should appear, by the demurrer, that the plaintiff has a good cause of action; which *prima facie* entitles him to judgment, unless it is destroyed by countervailing testimony.

But, if the plaintiff does set forth a good title in his declaration, the defendant must answer by a good bar, or the plaintiff may demur. For his own title being good, unless a proper defence to it is set up, he ought to have judgment. So if the plaintiff proves a good cause of action, the defendant must avoid it by a proper defence. For the plaintiff will be entitled to judgment. For an insufficient answer can be no bar to a good title, which necessarily stands, until it is obviated by a paramount defence.

But if the declaration contains a good title, the plea a good defence, then the plaintiff must reply a sufficient matter, to avoid the plea, or the defendant may demur; because having given a sufficient answer to the claim it will stand, until repelled by some new matter offered by the plaintiff. So if the plaintiff proves a good cause of action, which is destroyed by the defendant's defence, the plaintiff must avoid the defence by countervailing evidence, on his part; for his evidence being destroyed, by that of his adversary, his action is destroyed also, unless he can repel the defence. And so on, *in infinitum*.

Thus far is sufficient to shew the analogy between the demurrers; which upon examination will be found to run, through all the various stages of a cause; with this difference only, that where the demurrer is to the pleadings, the alternate steps are distinctly shewn; whereas, in the demurrer to evidence, the testimony is thrown together

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either, without order or arrangement; so that the alternate steps do not at first sight appear. But still the principles remain the same; because they exist in the very nature of things; and the Judge, when he comes to decide, is necessarily drawn into the arrangement.

It follows therefore that in every step, in pleadings or in proof, unless where the defendant demurs to the plaintiff's evidence, in the first instance without offering any on his own part, the demurrant must shew, that his own title is good, before he can derive any advantage, from the weakness of the countervailing claim.

To illustrate this by some examples.

If in ejectment for lands, the defendant shews a conveyance from the plaintiff, the latter may prove that it was given during coverture: To which the defendant may shew subsequent acts of ratification; after the disability removed; and to this the plaintiff may demur, if she thinks the defence incomplete. But then she must, in her demurrer, shew the coverture; or the conveyance being proved, shall entitle the defendant to judgment, whether, the defendant's other testimony be important or not.

So, if in an action of *indebitatus assumpsit*, the plaintiff does not prove the consideration, and promise, the defendant may demur, for the insufficiency of the testimony; but if the consideration and promise be proved, and the defendant produce a receipt against all demands, here, if the plaintiff offers to prove, that it was given for a part, the defendant, if he thinks the testimony does not avoid the receipt, may demur to the evidence; but then he must produce the receipt itself, or the plaintiff, having proved an original cause of action, will recover, whether his subsequent evidence be important, or not.

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: So that in every case the demurrants testimony must not only contain an answer to that of his adversary, but it must moreover shew a complete title, through all the stages of the evidence.

The propriety of stating the whole evidence is more obvious, when the object of the demurrer is considered: Which is, that the jury, if they please, may refuse to find a special verdict, and then the facts never appear upon the record; to prevent which inconvenience the party resorts to the demurrer, in order to exhibit all the facts, for the judgment of the Court, *Doughl. 127.* So that the demurrer is, in fact, a mere substitute for a special verdict. But in a special verdict, all the facts on both sides must be found, or the court will grant a new trial; and therefore in the demurrer, which is the substitute, the same thing must be done, or the Court may refuse to receive the demurrer. For the Court are to judge of the *allegata et probata* on both sides; and not upon those of one side only. In other words, they are to decide upon the whole case, and not upon parts: or else, the truth of the title never could be discerned.

A moments reflection will inevitably lead us to this conclusion. For if the testimony on both sides was not stated, the combination and connection of the parts could not be perceived. It would often times become a mere *sarrago* of unintelligible jargon for want of knowing the points, to which, the repelling testimony, of the party demurred unto, was applied. So that, although the question might turn upon the competency of the repelling testimony only, it would never occur; but the Court would have to decide upon that, which was offered, by the adversary, before the demurrant ever produced any at all: And thus it would inevitably happen, that it would be impossible to have the very point determined, by the Court, which was meant to be decided.

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It will be no objection to say, that, by this means, the person demurred unto, will be driven to admit the truth of the demurrants testimony. or that consequence does not follow.

There are but two grounds upon which that objection could possibly occur; namely, the credit of the demurrants witnesses; and the circumstances which he might insist on, to establish particular facts. For, as to facts actually proved, the demurrant has as much right to state those in his own favor, as the party demurred unto, has to state those in his favor.

But neither of those two cases produce the effect objected to.

Not the credibility of the demurrant witnesses: Because the demurrant, when stating his own testimony, can only insert the undisputed facts; and any objection as to the credit of the witnesses, if any, that alone is a sufficient reason for rejecting the demurrer; because the credit of a witness is a matter of fact, and not of law; and as the Court cannot try a matter of fact, it must, if insisted on, remain with the jury. Therefore if the demurrant refuses to take the cause from the jury to the Court he must relinquish the impeached witnesses.

Not the circumstantial evidence:

Because the demurrant necessarily yields up his presumptions and probabilities; for by drawing the issue from the jury to the Court, he loses the opportunity of insisting on them before those, who are able to draw conclusions of fact. But the case of the party demurred to is very different; if he insists on probabilities and presumptions, the demurrant is bound to admit the fact he would infer from them; because he is forced into the demurrer against his consent, and has no opportunity of addressing the jury to infer them. He is, on this account however, bound to admit the facts, which the demurrant would establish by such

testimony;

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testimony; because the demurrant might have left them to the jury; and he cannot, by drawing the cause *ad aliud examen*, oblige the other party against his inclination to confess what he was disposed to deny. The demurrant is therefore driven to state the facts he actually proves, without any inferences from circumstances; and if any contest arises about the facts so proved, it is to be referred to the Court. Because the whole operation of entering the matter upon record, and conducting a demurrer to evidence, is, and ought to be, under the direction and controul of the Court; subject however to an appeal, by bill of exceptions, if any point be improperly recited or rejected by them. For it is said, that if the Court may overrule, it may also regulate the entry of the proceedings upon the record, and the admissions which are to be made previous to the allowing of the demurrer.

Thus then it clearly appears, that the objection is imaginary; and that the person demurred to is not bound to admit the truth of the facts insisted on by the demurrant; but that the latter must prove them. Yet when he has proved them he has a right to insist on their efficacy, in destroying the opposite claim.

The propriety of these remarks is the more obvious from the following consideration, namely, that the court is to pronounce, whether the plaintiff, or defendant, is entitled to the matter in controversy; which they cannot do, if the whole evidence is not stated: Especially as it seldom happens, that the demurrer is argued the same term, in which it is filed; and therefore whether they be the same, or other judges, they can know nothing of the matter, unless the whole testimony appears of record. Thus far on principle:

II. But upon authority the point is equally clear.

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A demurrer to evidence may be defined to be, an allegation of the demurrant, which, admitting the matters of fact alledged by the opposite party, shews, that, as set forth, they are insufficient in law for the adversary to proceed upon, or to oblige the demurrant to give any, or a further answer thereto; either because they are, in point of law, defective in themselves, or are, in law, destroyed by countervailing testimony. It is thus described by Sir William Blackstone, "But a demurrer to evidence shall be determined by the court, out of which the record is sent. This happens, where a record or other matter is produced in evidence, concerning the legal consequences of which there arises a doubt in law; in which case the adverse party may, if he pleases, demur to the *whole* evidence; which admits the truth of every fact that has been alledged, but denies the sufficiency of them *all*, in point of law, to maintain or overthrow the issue; which draws the question of law from the cognizance of the jury, to be decided (as it ought) by the court." This passage proves expressly his own opinion to have been, that it was necessary to state all the evidence. Because he says, that the party may demur upon the *whole* evidence; which, admitting the facts, denies the sufficiency of them *all* to maintain or overthrow the issue.

This agrees with the doctrine laid down by the court in the case of *Wright vs Pynder*; the statement of which according to *Allens* report of it was as follows, "In a trover and conversion brought by an administrator; upon *not guilty* pleaded, the defendant upon the evidence confesses, that he did convert them to his own use; but further saith, that the intestate was indebted to the King, and that 18. May. 14. Car: it was found by inquisition, that he died possessed of the goods in question; which being returned, a *venditioni exponas* was awarded to the sheriff, who by virtue thereof sold them to the defendant. And to prove this, the defendant shewed the warrant of

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“ the Treasurer, and the office book in the exchequer, and the entry of the inquisition, and the *“ venditioni exponas* in the clerk’s book; to which the plaintiff saith, that the matter alledged is not sufficient to prove the defendant *not guilty*; and that there was no such writ of *“ venditioni exponas*. And the defendant saith, that the matter is sufficient, and that there was such a writ.”

In this case, according to *Styles* 34, “ **ROLLS** Justice took two exceptions to the pleading; (meaning the demurrer; because the plea was *not guilty*;) 1. That the goods mentioned in the schedule appear not to be the same contained in the declaration. 2. No title is made to the indenture by him, who brings the action, and concluded upon the whole matter that the demurrer was not good, and that there ought to be a *venire facias de novo*, to try the matter again. *Bacon Justice* much to the same effect, but differed in this, that there ought not to be a *venire facias de novo*, but said, that judgment ought to be given against one party, to wit, the defendant, for ill joining in demurrer, to the intent, the party that is not in fault may be dismissed, and the parties here have waived the trial *per pays* by joining in demurrer. But *Roll* answered that no judgment at all could be given, for both parties be in fault, one by tendering the demurrer, the other by joining in it, and the defendant might have chosen whether he would have joined or no, but might have prayed the judgment of the court whether he ought to join.”

Here both judges agreed that the demurrer was bad, in not ascertaining the goods, and setting forth the plaintiff’s title to the indenture: They differed, indeed, as to the judgment to be given; one of them thought, there ought to be another *venire facias*; the other that there ought to be judgment final; but both opinions were grounded

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on the imperfection of the demurrer. Taking either opinion, however, to have been the correct one, and it equally proves, that the court were right in rejecting the demurrer in the present case. For if a new *venire facias* ought to have gone, then the court were not bound to receive a demurrer, merely for the form of setting it aside again; and if there ought to have been final judgment, against the tenants, for joining in an insufficient demurrer, that alone is a proof, that the court ought not to have received the demurrer, and compelled the defendants to join. In point of fact, however, a *venire facias* was actually awarded as appears by *Allens* report of the case.

We have then, both the opinion of a most able commentator, and an express decision of the court, that it is necessary for the demurrant to state the whole evidence, and to shew a complete title. They are therefore authorities in the very point; and decide the present question, without any necessity for a further enquiry.

But, as the point is of importance, it may be worth while, to investigate it a little further; and to examine precedents, upon the subject, in books of entries: Because the forms of pleadings are always considered as evidences of the law.

In *Rastalls* entries 148 pl. 12, there is a demurrer to evidence to the following effect:

“ And upon this, the aforefaid D. G. and M.  
“ shewed in evidence to the jurors aforefaid, to  
“ verify and prove the issue aforefaid, on their  
“ part, to wit, (*as in the evidences;*) and the  
“ aforefaid I. B. and B. to verify and prove the  
“ issue aforefaid, on their part, to wit, that they  
“ had not entered into the tenements aforefaid,  
“ with the appurtenances, shewed in evidence to  
“ the jurors aforefaid, and say &c. (*as in the evi-*  
“ *dences.*). And the aforefaid G. and M. say,  
“ that they to the matter aforefaid, by the said I.

“ B.

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"B. and B. above in evidence to the jurors afore-  
"said shewn &c." Going on to conclude the de-  
murrer.

Which clearly proves, that the evidence, on  
both sides, is to be inserted. For such is the  
mode pursued in that form; as it first states the  
evidence of D. G. and M. and then that of I. B.  
and B.

This precedent agrees with the language con-  
tained in the first mentioned books; and the whole  
of them expressly supports the propriety of the doc-  
trine laid down by this Court in the case of *Hoyle*  
*vs Young*, 1. *Wash.* 152.

In which the President, in delivering the resolu-  
tion of the Court, says, "We think the proper  
"rule is to allow a demurrer to evidence at any  
"time before the jury retire, although the party  
"demurring may have examined witnesses on his  
"part, the *whole evidence on both sides* being stat-  
"ed; which in all cases ought to be done unless  
"the Court think the case clear against the party.  
"In which case, the books agree, that the Court  
"may refuse to receive the demurrer. In this  
"case, the opinion of the Court as to this point was  
"right, 1st, because the *whole evidence* was not  
"stated, and 2dly, because we think the case was  
"clearly against the defendant." This case there-  
fore confirms the others; and leaves the question  
no longer doubtful.

So that it may now be considered as a fixed rule,  
that in every case, the demurrant must insert the  
*whole* evidence; in order that the Court may  
judge whether *all* of it is sufficient to maintain the  
issue.

But it is more necessary still in a writ of right.

1. Because no other action remains to redress  
the error, if one intervenes in the trial of the  
cause.

2. Because

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. Because the court ought always to instruct jury on the trial of a writ of right, *Co. Litt.*; and, by analogy, they ought to be able, on cutting a writ of enquiry, after a decision of the juror, to say to the jury, that, upon the whole evidence, the right was with the tenant. But they cannot do, if the evidence is not stat-

As therefore a faulty demurrer was offered, and that demurrer did not shew title in the demand, the County Court did right in refusing to receive it.

In consequence of the various decisions in this court, that a demurrer to evidence cannot be used as a bill of exceptions, it becomes unnecessary to say any thing on the subject of *non tenure*. Therefore I shall only observe, that the act of Assembly, to avoid difficulties on the trial, seems to have intended, that every thing, which would destroy the demandant's action, might be given in evidence at the trial of the issue, upon the mere right. And I can never be right to say, that the demandant could recover lands to which he had no title, upon a mere slip in the pleadings. Besides, in *Evers' pleadings* 321, *non tenure* is expressly called a plea in bar; and if so, it ends that question.

**WILLIAMS contra.** I do not mean to controvert the doctrine on demurrers to evidence. But *non tenure*, upon this issue, was clearly absurd and improper. In a demurrer to evidence, every thing, which may be inferred, is admitted, and, if the objection that the demandant was not the Robert then mentioned in the will, be, at all, founded, might have been corrected by the judges' notes; the court will now set aside the proceedings, in order to supply the evidence.

*Cur: ad: vult.*

**LYONS Judge.** Delivered the resolution of the court, that the judgment of the District Court was erroneous, and to be reversed; and that of the County Court affirmed.

As

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As the Court did not explain the grounds upon which the judgment was given in the last case; and as the following is a case upon nearly the same title, and some of the judges in giving their opinions on it, stated the ground of decision in the last, I have thought it would be agreeable to the reader to publish it at this time; although not decided until two terms afterwards.

HYERS &amp; al.

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In a demurrer to evidence all the testimony on both sides ought to be inserted, and if the defendant in a writ of right demur to the evidence he must shew a title in himself.

Non tenure may be given in evidence where the wife is joined on the merits.

ROBERT WOOD brought a writ of right in the County Court of Hardy, against Leonard Hyers, John Hyers, Lewis Hyers, Martin Shobe, Rudolph Shobe, Martin Powers, Jacob Shobe, Christopher Ermontrout, Martin Shobe, jr. Abraham Stooky, Modlin Stooky and Conrad Carr, for "His fourth undivided part of one tenement, containing eleven hundred and twenty acres of land with the appurtenances in the county aforesaid, late the county of Augusta, on the South branch of Potowmack river, and bounded as followeth, to wit: Beginning at two red oaks, on the South side the North fork of the said branch, thence S. 28 W. 106 poles to a black walnut, white oak and Elm, on a branch at the foot of a hill, thence N. 74 W. 400 poles to a red oak, at the foot of a hill, thence N. 57 W. 248 poles to a white oak, on a hill; thence S. 52 W. 160 poles to a white oak, thence N. 80 W. 48 poles to two white oaks, thence N. 49 W. 100 poles, thence N. 15 W. 40 poles to a sugar tree and hickory on the said branch, thence down the several courses of the same to the beginning."

The

The parties joined the *mise* upon the *mere right* according to form in the act of Assembly.

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There is in the record a patent to Robert Green dated 12th January 1746, for 1125 acres of land in Augusta county, the boundaries of which are the same with those mentioned in the count. Also a deed from Mary Wood devisee of James Wood, James Wood and Robert Wood for her undivided moiety of the said tract of land. A copy of the first named James Woods will, whereby he devises his estate to his wife the said Mary Wood on condition that she pay to each of his children £20 at their coming of age. Also a copy of the will of Robert Green, in which is the following clause. I bequeath unto my sons James and Moses Green and their heirs and assigns one tract &c. as also all my part of the lands which now are patented in my name on the South branches of Potowmack river reserving to Colonel James Wood of Frederick county one half thereof, &c. And I do give and bequeath to the said James Wood and his heirs and assigns forever one equal half part of the said lands patented, on the South branch of Potowmack."

There are in the record seven leaves for three acres from Lord Fairfax for small tracts of land, to Jacob Stooky, Leonard Hyers, Martin Shobe, Martin Powers, Christopher Ermontrout, Barbara Shobe and Jacob Shobe, all dated the 3d of August 1773.

Upon the trial of the cause, the demandants filed a bill of exceptions to the Courts opinion, which stated, that "the demandants having offered on the trial a patent in the words and figures following 'George the second &c.' The tenants offered evidence to prove, that the land, they are in possession of and claim, is not the land demanded of them by the demandants." That the demandant excepted to the admission of the testimony but was overruled by the Court,

The

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The demandants likewise filed another bill of captions in the following words,

" The demandants in these causes offered :  
 " murrer to the evidence exhibited by the tenants  
 " setting forth that evidence and also the evidence  
 " exhibited in behalf of the demandants, in the  
 " words and figures following, to wit: One from the  
 " trial of these causes the said tenants gave in evidence  
 " the following leases from the late Leonard Fairfax  
 " to Jacob Stooky in the words and figures following,  
 " to wit: This indenture &c. One from the same to Leonard  
 " Hyers in the words and figures following, to wit: This  
 " indenture &c. One from the same to Martin Shobe in the  
 " words and figures following, to wit: This indenture &c.  
 " One from the same to Martin Powers in the words and  
 " figures following, to wit: This indenture &c. One from  
 " the same to Christopher Ensign in the words and figures  
 " following, to wit: This indenture &c. One from the same  
 " to Benjamin Shobe in the words and figures following,  
 " to wit: This indenture &c. One from the same to Jacob  
 " Shobe in the words and figures following, to wit: This  
 " indenture &c. And that they proved those to whom the  
 " said leases were granted had been in possession twenty  
 " two years under the said leases, and twenty years previous  
 " to the upper part of the land demanded by the demandants  
 " in their declaration, lies one mile below the confluence  
 " of the North, and the South branch, and on the side  
 " opposite from the North fork; and proved by Jonathan  
 " Heath that he was summoned by the sheriff of Hampshire  
 " county, to attend the surveying a tract of land being  
 " the land in dispute between the parties aforesaid,  
 " whereon Leonard Hyers and others now live; where  
 " was present, Col. Joseph Nevill and John Foley  
 " surveyors. That he began said survey about two and  
 " one half miles on the South branch of Potowmack  
 " about three miles below the mouth of the North  
 " fork, and to where fort George formerly stood, then  
 " course

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corner extended eleven poles up a run, between two hills, the second course crossed the point of a hill which was not passable; they measured back on the first course, into the bottom, to enable them to run the second course. The second course, as the surveyor then run, was on the point of a hill, where there was no timber cut, at the third corner, there was but little timber, the fourth corner, no timber cut, the fifth corner, cleared, the sixth corner no timber cut, at the seventh corner, no timber cut, except a road along the river, the last course called for forty poles but found only six, when we came to the river, which if they had extended agreeably to the deed, would have carried them over the South branch to a pine hill. They then went down the different meanders of the river to the beginning. That they diligently examined the different corners, but found no corner tree, nor side mark; that there was an allowance made of two and one half degrees variation. And further proved by Job Welton, that he was summoned by the sheriff of the county, to attend a survey on the lands in dispute, and that they began the first course of the survey about the middle of the South branch where fort George formerly stood, that they run the first course, one hundred and six poles, about eleven rods of which was up a run between two hills, where the timber was chiefly cut; they then started on the second course, and run some distance when they came to a steep bank which they could not go down; they measured back on the first course into the bottom, to enable them to run the second course. The second course as the surveyor then run was on the point of a hill where there was no timber cut, at the third corner, there was but little timber, the fourth corner, no timber cut, the fifth corner cleared, the sixth corner no timber cut, at the seventh corner no timber cut, except a road along the river,

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" the last course called for forty poles, but for  
 " only six, when we came to the river. They then  
 " took down the different meanders of the river  
 " to the beginning. That they diligently examined  
 " the different corners, but found no corner tree  
 " nor side mark, that there was an allowance made  
 " of two degrees and an half in the variation, and  
 " that he was present when they run out the  
 " land in 1773; When no marked trees, nor  
 " corners, could be discovered. They also gave  
 " in evidence the act of Assembly passed in the  
 " year 1736, intituled an act for confirming and  
 " better securing the titles to lands in the Northern  
 " neck. And they further proved by Moses Hutton,  
 " that he the said Hutton, has been in the  
 " country fifty odd years, that he has always  
 " heard the South branch, the South fork and the  
 " North fork called as they now are; that the land  
 " in possession of the tenants lies on the South side  
 " of the South branch, and he believes about one  
 " mile below the North fork. And by William  
 " Cunningham fear. that he has been on the South  
 " branch fifty eight years, that Solomon Hedge  
 " lived on the land in dispute fifty five years ago  
 " that the father of the Shobe's, the present  
 " tenants, was in possession of the said land about  
 " fifty years ago, and that the tenants have lived  
 " there ever since, but the said witness knows  
 " no title that they had. The said land lies a mile  
 " a mile and an half below the North fork and on  
 " the South side of the South branch. That the  
 " South branch, the South fork and the North  
 " fork have been understood as such during the  
 " whole time he lived in this country. To which  
 " evidence the demandants counsel demurred as  
 " insufficient in law, to support the right of the  
 " tenants to the lands in contest, and produced in  
 " support of their rights a copy of a patent duly attested  
 " as the law directs, from George the second  
 " late king of Great Britain; in the words and  
 " figures following, George the second &c. and  
 " the act of Assembly passed in the year 1748, entitled

" titled

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itled, An act for confirming the grants made by his Majesty, within the bounds of the Northern Neck, as they are now established; and also a copy of the last will and testament of Robert Green deceased, authenticated under the seal of the county of Orange, where the same was admitted to record, in the words and figures following to wit: In the name &c. And a copy of the will of James Wood deceased, certified under the hand of the clerk of the county of Frederick where the same was admitted to record, in the words and figures following, to wit: In the name &c. And also a copy of a deed from Mary Wood to the said demandants, certified under the hand of the clerk of the county of Hardy, where the same is recorded in the words and figures following, to wit: This indenture &c. the above being the only evidence given on the part of the demandants; and pray the judgment of the court, whether they have more right to the tenements which they demand against the tenants, or they to hold as they demand. To the reception of which demurrer the tenants by their counsel objected, for the following reasons, because the demurrer contained as well the evidence demurred to by the demandants, as the evidence exhibited by the demandants; and that the facts which that evidence relates contained matter proper for the consideration of the jury. Which objection was sustained by the court.

Verdict and judgment for the tenants; upon which the demandant appealed to the District Court.

The District Court was of opinion, that the judgment was erroneous, in this, "that the court below ought not to have admitted the evidence stated on the part of the tenants as mentioned in the demandants bill of exceptions to have gone as evidence to the jury; and in not receiving the demurrer of the said demandant."

That

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That court therefore reversed the judgment; and thereupon the tenants appealed to this court.

CALL for the appellant. This case exactly resembles that of *Hyers vs Green*, \* except, that here is a bill of exceptions to the testimony proving the *non tenure*, and not a demurrer only, as was the case there. But that circumstance will not make a material difference; because, if the *non tenure* could not have been given in evidence, in that case, the Court could not have decided for the tenants, upon evidence introduced for the purpose of proving the *non tenure*. Besides it may be a question, whether the demandant, by offering to demur in this case, ought not to be considered, as thereby consenting to waive his bill of exceptions?

WILLIAMS *contra*. Contended, 1. That *non tenure* could not be given in evidence at common law. 2. That the act of Assembly had not altered the common law, in this respect. 3. That, if *non tenure* could be given in evidence, the judgment ought to be the same, as the judgment on *non tenure* at common law.

Upon the first point: The issue is joined upon the mere right; the pleadings are in that manner; and the party cannot alledge in evidence, what would go to falsify his own pleadings. When therefore the defendant pleads to the mere right in the land, he insists upon his title only; and therefore renders it unnecessary, for the other side to prove the identity. If then he is suffered to give evidence of *non tenure* on the trial, he will take his adversary by surprize; as the latter will not come prepared to meet the objection. Besides *non tenure* is a plea in abatement; and therefore ought to be plead, or it cannot be taken advantage of afterwards. 5. *Bac. abr. (last edit.)* 426.

Upon the second point: The act of Assembly does not alter the rules of the common law upon this

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\* Ante. 555

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subject. For that only furnishes a shorter  
e of joining the wife upon the mere right, but  
not alter the rules of proceeding, prior to the  
being joined. For the act of 1786 *Rev. Cod.*  
6, ought to be read with that of 1792 *Rev.*  
*p. 118 sect. 25*: Which expressly treats *non*  
*tenure* as a plea in abatement, and supposes that  
it will be insisted on, before the wife is joined.  
According to which reading, the act will stand  
as: If the tenant shall not plead *non tenure*, *join-*  
*tenure*, or *several tenancy in abatement*, he may  
plead in this form, or to this effect, &c. as in the  
act of 1786. Another argument on this point is  
that, at common law, the wife was not joined up-  
on collateral points, such as, *non tenure* &c. but  
only were tried by a common jury; and therefore  
the act only speaks of the wife, it follows, that  
these collateral matters were not designed to be in-  
cluded.

Upon the third point: If *non tenure* could  
be given in evidence, still the judgment of the Coun-  
cil Court is wrong. For it ought to be according  
to the judgment at common law: which was not  
a judgment in bar: It acquitted the tenants  
of the land, but the demandant recovered the lands  
*362. 363. 1. Bac. abr. 21.* Therefore  
the judgment, in the present case, which goes in  
against the demandants claim, is clearly wrong,  
and ought to be reversed.

The demurrer does not waive the bill of excep-  
tions, as the counsel on the other side supposes.  
For if they be repugnant, it would only prove,  
that the demurrer ought not to be received, but  
that the bill of exceptions should be relinquish-

CALL. *Non tenure* may be given in evidence,  
under the act of 1786, although the wife is joined  
on the mere right. For the act is positive that  
a matter may be given in evidence which might  
have been specially pleaded: And as *non tenure*

clearly

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clearly might have been specially pleaded before the act, it follows, necessarily, that it may be given in evidence since. This is the more necessary, because, in practice as well as according to the principles of law, the defendant is now obliged to plead in the form prescribed by the act of Assembly: For I am informed, that one of the District Courts refused to permit the defendant to plead a common law plea. A refusal warranted by principles of law, and the rules for constructing statutes: By which, the word *may* is understood to be imperative, and synonymous with *shall*, 6. *Bac. abridg.* (new edit.) 379. Of course there is no choice left to the defendant, but he is obliged to plead the plea, which is prescribed by the act. But it would be preposterous to oblige him to pass by a plea which would defend him, and to put in another which will not, without allowing him to give, the matter of the first in evidence. This would be an act of injustice, which ought not to be imputed to the Legislature, when an obvious construction will avoid it.

There are other considerations, which render, what we contend for, peculiarly proper; namely, the object of the act, and the state of the practice in this country. The object of the act was clearly to simplify the pleadings in this action, and to rid it of all its entanglements and difficulties, by permitting the parties to try their claims, without the dangers, to which, the common law pleadings were exposed. The object therefore ought to be promoted, in the construction of a remedial statute. And this is rendered peculiarly necessary, when the state of the practice is considered. For the gentlemen, who practise in the Inferior Courts, are constantly riding about from Court to Court, and are generally obliged to plead upon the spur of the occasion, without an opportunity of consulting their books, or reflecting on the nature of the case. In this situation, they are forced to make use of the first form which presents itself; and none, in such a dangerous action as this is, at common

non law, would so obviously occur, as the  
 in the act of Assembly: Especially, as it  
 oftentimes be impossible, for the client him-  
 self to say, whether the bounds, described in the  
 act, correspond with those of his own land.  
 Considerations of this kind ought to have weight;  
 and accordingly, in the case of *Downman vs*  
*Downman's exr's* 1. *Wash.* 26, the state of the  
 act, in this country, was one reason given,  
 the court, for the opinion, that a plea of ten-  
 ure, if right in form, might be offered, after an  
 act judgment.

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But there is another circumstance which renders  
 highly important, that our construction of the  
 act should be adopted; namely, that, at common  
 law, the defendant had a right to demand a *view*,  
 before he plead; and then he was at liberty to  
 plead *non tenure* of the lands in the count, or of  
 those put in *view*, at his election. *Baptists real ac-*  
*tions* 30. 15. *Vin. ab.* 591—2. But, as by the act  
 of 1748, this right to demand a *view* is taken  
 away, the tenant has no opportunity of knowing  
 the lands, which are specifically demanded, until  
 he comes upon the trial; and therefore, unless he  
 may then object *non tenure*, and shew that the  
 lands, which the demandant pursues, are different  
 from those he describes in his count, and to which  
 matter the defendant is really entitled, he must lose  
 his own lands; and the demandant, instead of re-  
 covering the lands he really sued for, will have  
 judgment for those which did not belong to him,  
 merely from a slip in the pleadings. Thus if the  
 demandant has title to a piece of land, which in  
 the act is claimed by C, but which he supposes to be  
 in the seizen of B, and therefore brings suit against  
 B. for it; but, by mistake in setting forth the boun-  
 daries, he describes the land which really belongs  
 to B, and the latter, supposing that to be the sub-  
 ject of the suit, puts in the plea prescribed by the act:  
 Here although, upon the trial, it clearly appears,  
 that the land sued for is really that, which C.  
 claims, and not that belonging to B, yet the lat-  
 ter will not be allowed to shew this fact, but must

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submit to a judgment, although he does not the lands demanded. A consequence which would not have followed, if he could have demanded *view*; because he might then have pleaded, that he did not hold the land put in *view*, and thus avoided the writ. But surely if the law has taken away the *view* for the benefit of the demandant, so as to avoid delay, it ought not to deprive the tenant, of the benefit of the same matter, in defence.

There is perhaps another ground, upon which this right may be maintained. A well known distinction exists between writs, which are abated merely, and writs which *de facto* abate. In the first case the matter must be pleaded, but not in the other. An instance of the latter kind, is this: one brings a suit in the name of a dead man, or a fictitious person, here, although the defendant may, by mistake, happen to plead in chief, when the fact is discovered the proceedings must be stopped, and the suit abated. There is the same reason for abating the suit, where it is found, that the plaintiff sues for different lands, than those in the possession of the defendant. For it would be absurd, to permit the plaintiff to recover, against the defendant, lands, which the latter does not hold; and therefore could not render to him.

These principles must have regulated the decision, in *Hyers vs Green*; because it was impossible to have decided for the tenants, in that case, without overruling the exception in this. And in *Beverley vs Fogg* 1. *Call's Rep.* 484, the court must have been under the influence of similar reasoning. For there the exception was, that the boundaries of the land were not set forth in the count; and the answer was, that it was too late to make an objection upon that ground, at the trial. "For the tenant having gone to issue on the count, he had taken on himself the knowledge of the lands demanded." Which is the same objection, in other words, as that taken in the present case;

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the objection, here, is no more, than that the  
demandant, by pleading in chief, undertook to  
show the lands; and that was the very argument  
in support of the use of there. Of course, as it did not pre-  
vail there, no more ought it here: Especially as  
the Court, in giving judgment there, say, that the  
demandant had not found the boundaries; which admits,  
that there may be a specification of the lands, up-  
on the trial.

The demandant receives no prejudice from our  
decision; because the judgment, in this case,  
does not bar his recovery of his own lands, if he  
has a title, against the person who actually has pos-  
session of them.

The judgment in *non tenure*, is not such as the  
demandant supposes. For if *non tenure* be a mere plea  
in abatement, yet, as a plea in abatement it va-  
cates and destroys the writ; and therefore the de-  
mandant cannot have judgment: Because the writ  
is the foundation of the plaintiffs recovery. But  
if there be no writ, there can be no recovery; and  
if a writ is abated, it is the same thing, as if  
there never had been one at all; and both parties  
out of Court. Therefore *Booth* \* in his book  
*real actions* says, that "if the tenant do not  
show any part of the land, *i. e.* be not tenant of  
the freehold, the writ shall abate; because, as  
Bracton says, he cannot lose that which he has  
not; and therefore the writ shall fall." Which  
shows clearly that no judgment is to be rendered  
for the demandant, on such a plea. Nor do the  
authorities, cited on the other side, prove it. For  
the passages quoted from *Littleton Sect. 691, 692*,  
only state, what will be the consequences of the  
demandants entering on the lands, after the judg-  
ment against him on the plea, and not that any  
judgment, at all, shall be rendered for him: Which  
is the very exposition given of them, by *Lord Coke*;  
who

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who says *fol.* 363. (a.) " *Albeit* in this case, " in the case before, the entry of the demandant " is his own act, and the demandant hath " *press judgment* to recover, yet he shall be " *dismissed*." Which clearly repels the idea, suggested on the other side.

It is unnecessary, to say any thing, as to merits; because they are admitted to be the same with those in *Hyers vs Green*; and consequently in favour of the appellants; so that the case rests merely on the technical exception.

The offer to demur is a waiver of the bill of exceptions; because they are repugnant. For, in demurring, the party admits the evidence; and denies the inference of law. Therefore to except and demur too involves a contradiction; and, consequently, the one must be considered, as a waiver of the other; or else the court will permit the party, to take contradictory steps.

WICKHAM *contra*. The point of *non ten* was not decided in *Hyers vs Green*.

LYONS Judge. I understood the decision in *Hyers vs Green*, to have proceeded on the ground that the plaintiff had not shewn any title in himself.

WICKHAM. Then we are still at liberty to argue the point of *non tenure*. If the counsel, on the other side, are right, in their construction of the act of 1786, then judgment final is to be entered against the demandant in favour of the tenant, who will thus become entitled to the land of the demandant, although he had no right to them; for the demandant will be for ever barred to claim them in any other action: Which must certainly be contrary to the intention of the Legislature. The word demurrer in the act of 1786 shews, that the tenant is not obliged to join his wife upon the mere right; and consequently that the word *may* is not imperative, as those on the other side suppose. Nor do the cases, cited from

6. Bac.

*fac.* prove it; for they relate to the acts of the officers. The argument, drawn from the line of views, is plausible, at first sight, but founded on a mistake of the subject; for that led to the title papers. Nor does the case of *Everley vs Fogg* apply; because it is necessary, the count should describe the bounds; so that the sheriff may know, what lands to deliver, and the land marks should be perpetuated. The act of 1786 only relates to pleas in bar; like pleading the general issue, with leave to give the special matter in evidence.

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The demurrer is no waiver of the bill of exceptions. For the exception is to the admissibility; the demurrer denies its force, when admitted.

RANDOLPH in reply. If the tenants are entitled to the lands they hold, they ought not to lose them by a slip in pleading; yet such would be the consequence of the doctrine contended for, on the other side. But fortunately the law does not warrant the doctrine. The act of 1786 is express, that all matters of defence, of whatever description they may be given in evidence; and consequently *non tenure*. Which is agreeable to the doctrine of the common law; for, at common law, any thing but collateral warranty may be given in evidence. The tenants are obliged to plead the plea described in the act; which is imperative, as has been rightly stated. This is proved by the case of *Everley vs Fogg*; for the judgment there was reversed, merely because the bounds were not inserted in the count, agreeable to the directions of the act.

*Curr: adv: vult:*

ROANE Judge. This is a writ of right, for 120 acres of land on the South branch of Potowmack; The count and plea are both conformable to the act of 1786, and both describe the tract, as comprehended within the same boundaries. At the trial of the cause, two exceptions were taken

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by the demandants: 1. To the admission of testimony going to shew the non identity of the persons possessed by the tenants, with relation to those subscribed in the count and plea. 2. To the decision of the Court refusing to compel the tenants to join in a demurrer tendered by the demandant. In support of this last decision, two grounds were stated by the tenants counsel. 1. That the demandant had also inserted, in his demurrer, his own testimony. 2. That the facts, to which the evidence related, contained matter proper for the consideration of the jury. The judgment of the Court was reversed by the judgment of the District Court, "for that, as they alledge, the Court below ought not to have admitted the evidence stated on the part of the tenants, as mentioned in the demurrants bill of exceptions, to have gone as evidence to the jury; and in not receiving the demurrer to evidence."

The rectitude, of this opinion of the District Court, is now to be discussed; and I will first consider the case, on the second bill of exceptions relative to the demurrer to evidence.

As to the first objection stated by the tenants to the reception of the demurrer, I shall only say that in the case of *Hyers vs Green*, this Court were of opinion, on consideration of the case of *Hoyle vs Young* 1. Wab. 150. and other authorities, that the plaintiff ought, especially in a writ of right, also to set out his own evidence; and in that case, justified the rejection of the demurrer, on the ground, that the demurrant had not stated a title to recover, in respect of *his own* identity. This objection does not hold in the present case, for the identity of the demandant is fully manifested. I am not certain, whether the Court, in *Green vs Hyers*, considered the ground of the second objection, although the demurrers, in the two cases, are in that respect, substantially alike. But I take the rule to be, that although a Court ought to award a joinder in demurrer, where the

evidence

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Evidence demurred to is in writing, or, being *parol*, is explicit, and, and will not admit of variance, yet that, where the *parol* testimony is loose, indeterminate, and circumstantial, the party offering it, shall not be compelled to join in demurrer, unless the party demurring will distinctly admit every fact and conclusion, which such evidence, or circumstances, may conduce to prove. In support of this distinction, I beg leave to refer to 5, *Bac. abr. (new edit.)* 467, and the authorities there cited; and to say that the evidence in question, in this case, respecting the boundaries of the land, and the understanding of the country, relative to the description of the river, is entirely of this latter description, being both loose and circumstantial. The demurrer to evidence. therefore, may be thrown out of the case.

The only remaining point to be considered arises out of the first bill of exceptions; and is simply, whether, upon the *mise* being joined according to the form prescribed by the act of Assembly, evidence, going to shew a *non tenure* of the lands stated in the pleadings, be admissible?

The act of 1736, concerning writs of right, prescribes the manner in which demurrants *shall* count. It also prescribes a general mode in which the tenant may plead. I think it is not only inferable, from the various use of the words *shall* and *may*, but from the actual existence, at that time, of the act of 22 *Geo: 2. c. 1.* (since re-enacted) authorizing a plea of *non tenure* in abatement, that the general plea, prescribed by the act of 1736, is concurrent, and not exclusive.

Nor will the inconveniences result, which the appellees counsel apprehended; and which he stated would arise, from the different judgments, prescribed by the common law, in the case of *non tenure* being pleaded, and the *mise* being joined. If *non tenure* be now pleaded, the Court will give such judgment, thereupon, as the common law requires: But if it be given in evidence, and the jury find a  
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special verdict, affirming such evidence, the Court will give a similar judgment. If, however, such evidence be given, and yet a general verdict be rendered upon the right, such verdict is a negative of that evidence; and decides the right: In which case, a judgment, corresponding with the verdict, ought to be rendered.

For these reasons, I think the judgment of the County Court was correct; and that the judgment of the District Court, reversing that judgment, ought to be reversed.

FLEMING Judge. This is an appeal from a judgment of the District Court, reversing a judgment of the County Court, rendered in favor of the appellants in this Court; and the reasons, given by the District Court, are, 1. That the County Court permitted evidence to be given to the jury, that the tenants were not in possession of the lands demanded, when the issue had been joined, between the parties, upon the mere right. 2. That the County Court did not compel the tenants to join in the demurrer to the evidence, which was tendered by the demandant.

As to the first: The Legislature of this country, in order to simplify the pleadings; expedite the trials; and prevent unnecessary delays in writs of right, have taken away the *views* and other dilatories, and obliged the tenant to plead the general issue, and put himself upon the assize; allowing him to give any matter in evidence, at the trial of the cause, which might have been specifically pleaded. This latter provision appears to have been made, in order to reserve to him the benefits, to which he would have been entitled by the common law proceedings; and therefore he ought not to be deprived of them by arguments drawn from the common law, before the mode of proceeding was changed by the act of Assembly.

But it is objected by the counsel for the appellants, that the act of Assembly does not oblige the

tenant

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Wood.

Tenant to put himself upon the affize; for, by using the word *may*, they leave it optional in him, to put in the plea prescribed by the act, or to plead any matter specially, according to the course of the common law. Such a construction, however, would render the act a dead letter; for the tenant might, at common law, have joined the mise upon the mere right, and put himself upon the affize, without the aid of a statute, to enable him to do it. This shews that a change in the proceedings was contemplated; and that the word *may* was intended to be compulsory. In other words it was not intended, that it should be left to the tenants option, what he would plead, but the meaning was, that he should be obliged to use the plea prescribed by the act: However, in order to prevent his sustaining any prejudice thereby, he is allowed to give any matter, in evidence, which he might have specially pleaded. By this means, the proceedings are simplified, and delays prevented, without any injury to the party: Which was the great desideratum, and what the statute was designed to effect. Consequently, it would be thwarting the will of the Legislature, and defeating the end of the act of Assembly, if we were to throw the party back again upon the technical rules of the common law; which the statute was made to correct.

I am therefore clearly of opinion, that the County Court very properly permitted the evidence of *non tenure* to be given to the jury; and consequently that the opinion of the District Court upon that point was erroneous.

With respect to the second point relative to the demurrer to the evidence: After the County Court had permitted the evidence to go to the jury, the cause rested on a single point; namely, whether the lands in possession of the tenants were the same, with that claimed by the demandant in his count? This was a mere fact, proper for the consideration of the jury upon the evidence; and

therefore

Hypers  
or  
Wood.

therefore I think the County Court very properly left it to their decision.

The result is, that I am of opinion, the judgment of the District Court was erroneous upon both grounds; and therefore, that it ought to be reversed, and the judgment of the County Court affirmed.

LYONS Judge. The demurrer, after stating the titles and claims of all the parties, reduces the question to a single fact; that is to say, whether the land claimed by the demandant, and in possession of the tenants, is within the bounds of the patent granted, to Robert Green, in the year 1746, for 1120 acres, in the county of Augusta? Or in other words, whether it is the same land, which was surveyed for, and granted, to Robert Green by that patent? This was a simple question of fact; which a jury alone could, and ought to have determined. Therefore I think, the County Court, very properly left it to their decision.

But it is objected, that the tenants, not having plead *non tenure* in abatement, were precluded from giving it in evidence, or in any manner questioning the identity of the land. Suppose that position, were to be granted, could the demandant recover without shewing some title? After offering, in his count, proof of his right, has he produced it, or shewn any title, to the land which he has surveyed in possession of the tenants? That land lies on the South side of the South fork of the South branch; and not on the South side of the North fork, as his patent calls for, and states the land he claims to lie. Then is it just, or can it be law, that after an issue is joined on the mere right, that the claimant shall recover land to which he shews no right, merely because the tenant cannot produce a patent for it! Surely, possession in such a case gives the best right; and the demandant ought not to be allowed to disturb it, without shewing a complete title in himself.

Suppose

Hyers

Wood.

Suppose the tenants had produced a prior patent for lands lying in the county of Augusta, and insisted that the lands claimed were within the bounds of their patent, must not the jury have enquired into the bounds of both patents, and determined whether the lands were included in either? And, if not included in either, what must have been their verdict? Could they have found for the demandant, who had no better title than the tenants? Surely not, for he could have no claim to a verdict, without shewing a title. But if the tenants may controvert the boundaries, where different patents are produced, without pleading *non tenure*, I see no reason why they may not do it in every other case. The difficulty arises on account of the judgment to be entered in such cases, as it is a bar to the demandant to sue the tenant again. This might have been provided for by the Legislature, when they were altering the mode of proceeding; but having omitted to do so, the legal consequences must take place.

If however the tenant does not chuse to enter into the controversy, respecting the title, or bounds, on the general issue, he may still plead *non tenure* in abatement, as the act does not forbid it. All the difference is, that a different judgment will be entered for the tenant in that case, if found for him, than would be entered on a joinder of the issue; and that the demandant may take issue on the *non tenure*, or discontinue his suit as he sees proper.

Upon the whole, I am of opinion, that the judgment of the District Court should be reversed; and that of the County Court affirmed.

END OF THE SECOND VOLUME.





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2 The executors of a consignee will not be liable for outstanding debts, unless there be gross negligence. *Ibid.*

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*Knox vs Garland.* 241

2 When the plaintiffs evi-  
dence is not doubtful and un-  
certain, but defective only, the  
defendant may demur. Ibid.

3 In such a case, if the court  
does

does set aside the demurrer, and award a new trial, the defendant may appeal. 241

4 And if the defendant offers to appeal, and the court refuses it, this court will reverse the judgment, notwithstanding there was a continuance by consent at a subsequent term, and after that a verdict and judgment for the plaintiff. Ibid.

5 In a demurrer to evidence all the testimony on both sides ought to be inserted. *Hyers vs Green.* 555

6 In a demurrer to evidence all the testimony on both sides ought to be inserted, and if the demandant in a writ of right demur to the evidence he must shew a title in himself. *Hyers vs Wood.* 574

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an uncle of the half blood on the mothers side; leaving also, two relations on the fathers side. The estate was ordered to be divided into two moieties: One of which was to be divided between the two relations, on the fathers side; and the other moiety was to be allotted those on the mothers side, as follows; wit: two fifths to the uncle of the whole blood; two fifths to the three cousins; and one fifth to the uncle of the half blood. Ibid.

3 So much of the act of 1792, relative to descents, as is within the purview of that act, is not repealed. Ibid.

#### DETINUE.

1 If in a declaration, for several slaves, laying separate values, the jury find a joint value it is error: and as to that, *venire facias de novo* will be awarded, under the act of Assembly, in order to ascertain the separate values. *Higginbotham vs Buckner.* 311

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part of the pasture and wood-land, and shall enjoy the same peaceably; and after the decease of his mother, then he gives him and the heirs of his body all his lands, houses and appurtenances, both real and personal, forever; But if the child proves a female and lives till 21 or marriage, she shall have one half of his personal estate, and all his lands to her and the heirs of her body forever: But if the said child should die then he gives to his wife and her heirs forever, all his lands, slaves, stocks of cattle &c. and appoints her and her father executors of his will. The child proved to be a daughter: On her birth, she had a vested remainder in tail, with remainder in fee to the testator's wife. *Selden vs King.* 72

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3 Declarations, by the mortgagee, under whom the defendant claims, *that the mortgage was paid off*, are admissible evidence on the part of the plaintiff. *Waltball vs Johnston.* 275

4 Where the evidence was defective, as to a particular item, no decree, as to that item, was made. *M'Connico vs Curzen.* 358

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1 In the case of personal chattles a limitation, after a general *dying without issue*, is too remote; and therefore void. *Pleasants vs Pleasants.* 319

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1 Where goods are sold by a factor in Virginia, for merchants in Britain, it is necessary to state the name of the factor in the declaration.

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3 And a suit, of this kind, will be dismissed, after issue joined upon the merits, if the fact appear, upon the trial of the cause. *Ibid.*

4 And it will not prevent the dismissal, that there are money counts in the declaration. *Ibid.*

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*M'Connico &c. vs Curzen &c.* 358

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*Deans vs Scriba.* 415

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*Eppes vs Randolph.* 125

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*Ibid.*

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*Ibid.*

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LANDS.

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3 In this case, W. B. and N. acquired no title in the lands, by their first agreement with S; because S. himself had no right thereto, but it was in the Commonwealth. *Ibid.*

4 But M. must take the entry as made for him, so as to include the prior rights; for he cannot reject them, and go for the full quantity besides. *Ibid.*

5 Nor can he hold S. to warrant the lands in R. free from the titles of others. *Ibid.*

6 The judgment of the board of Commissioners, under the land law, is conclusive; and cannot be impeached.

*Stephens Cobun.*

440

7 And this notwithstanding the plaintiff was an infant, at the time, the judgment was given. *Ibid.*

8 In 1788, C. located a land office treasury warrant, issued 29th November 1783, on lands on the Eastern waters; P. (who, upon the trial, did not prove any title, in himself, to the lands located) entered a caveat, in the land office, against a patent to C. The District Court gave judgment in favor of C; and this Court affirmed it. *Field vs Culbreath.* 547

9 What is a good entry.

*Ibid.*

LEASES.

1 A. leases to B. for twenty years; with liberty to B. of surrendering the lease at any time before, on payment of 5/. A. devises the rents, during the lease, to his five daughters, and the fee simple afterwards to his son P; who sells to A; who surrenders the lease. This surrender shall not disappoint the daughters legacies; but A will be decreed to pay the rents. *Graham vs Woodson.* 249

LIEN.

Although a *scire facias* will renew the lien, created by a judgment, yet it will only operate *prospectively*, and will not have a *retrospective* effect, so as to avoid *mesne* alienations. *Eppes vs Randolph.* 187

Vide judgments.

LIMITATION

**LIMITATION. of ACTIONS.**

The saving, in the act of limitations, extends to a plaintiff resident in Maryland.

*Ozwald vs Dickenson.* 21.

**MANDAMUS.**

Vide *Superfedeas*.

**MARRIAGE ARTICLES.**

1 Marriage articles must be recorded within eight months, or they will be void against prior creditors.

*Anderson vs Anderson.* 198

2 Otherwise, if the recording was prevented by the fraud of the creditors.

*Ibid.*

**MILLS.**

1 Where, in a petition for a mill, the witnesses are divided, whether it will be injurious or not, and the County Court and District Court both decide, that it will not, this court will affirm the judgment.

*Horne vs Richards.* 507

**MORTGAGE.**

1 What shall be considered as a mortgage, and not a conditional sale.

*Robertson vs Campbell.* 421

2 There is a difference between a mortgage, and a conditional sale.

*Robertson vs Campbell.* 428

3 There will often be a difficulty in drawing a line between a mortgage and a conditional sale; but the question always is, whether a purchase was contemplated, and the price fixed, or a loan of money,

and a security intended.

*Robertson vs Campbell.* 429

4 An absolute conveyance will not prevent its being considered as a mortgage.

*Robertson vs Campbell.* 432

Vide account No. 1.

Usury No. 4.

**NEW TRIAL.**

1 After three verdicts, all agreeing, the Court of Chancery did right in decreeing according to the opinions of the juries.

*Stannard vs Graves &c.* 369

2 If in an issue from the High Court of Chancery, the judge, who tried the cause, is dissatisfied with the verdict, it ought to be certified of record; or if that be refused, a bill of exceptions should be taken.

*Ibid.*

3 And the omission cannot be supplied by affidavits, especially of the counsel; for it would be a most dangerous precedent.

*Ibid.*

**NEW APPEALS.**

1 What shall be considered as a new appeal.

*Skipwith vs Clinch.* 536

**NON TENURE.**

Vide writ of right.

**OLD GENERAL COURT.**

1 Their decisions, where they went to establish rules of property, are authority in this court.

*Wallace vs Taliaferro* 469

**PAPER MONEY.**

1 Receipts and payments, by an

1 administrator, ought not to be reduced to *specie*, by the legal scale of depreciation; but could be scaled in *paper money*. *Aliaferro vs Minor*. 190

2 The act of Assembly declares, that all actual payments, made in paper money in discharge of debts or contracts, shall stand at their nominal amount, without being scaled; or are such payments within the proviso empowering the courts to vary the scale upon equitable circumstances. *Aliaferro vs Minor*. 190

3 A. takes a lease of B. in May '77 for 21 years. In August 1778, a similar lease of the same estate is executed. The rents are to be settled by the scale of May 1777. *Skipwith vs Clinch*. 253

4 The last clause, in the act of 1781, applies to debts contracted during the existence of paper money only, and not to those contracted before. *Skipwith vs Blorton*. 283

Vide *specie*.

### PAROL AGREEMENT.

Vide agreement.

### PARTIES.

1 It is not regular to make a decree between two defendants, unless they consent. *Aliaferro vs Minor*, 107

2 Parties interested should have an opportunity of being heard. *Pleasants vs Pleasants*, 319

### PARTNERSHIP.

1 A, is indebted to D, F. & co. by bond: A. dies, and at the sale of his estate, by his executors, T. the acting partner of D, F. & co. buys a slave; which he carries to his own plantation, and there continues him. The amount of the purchase money, for the slave, is a good discount, against the bond. *Rose vs Murchie*. 409

2 In this country, where a retail store is opened, it is the store, which gives the acting partner credit; and which is liable for any commodities furnished him by the planter. *Ibid*.

### PERPETUITIES.

Vide estates.

1 The doctrine of perpetuities, and executory limitations, considered. *Pleasants vs Pleasants*. 319

2 Testator, in August 1771, devised that all the slaves, he should die possessed of, should be free, if they chose it, when they arrived to the age of 30 years, and the laws of the land would admit. This limitation was good in event. *Pleasants vs Pleasants*. 319

3 And therefore, after the act of 1782, on any persons giving such a bond, as that act requires, all of them above the age of 45, and their increase born after their respective mothers had attained the age of 20,

30, were entitled to freedom. But all, that were above thirty and under 45, were immediately entitled to emancipation. And all under 30, whose mothers had not attained that age, at their birth, and all their future descendants, born before their mothers attain 30, will be entitled to freedom on their arriving at the age of thirty.

*Ibid.*

4 The policy of the law, leans at least, as strongly against perpetuities, in personal, as in real estates.

*Ibid.*

### PLEADINGS.

1 If in trespass, the defendant pleads the word *justification*, only; and the plaintiff replies generally. No issue is joined in the cause; and therefore, after verdict for the defendant, a repleader will be awarded.

*Kerr vs Dixon.*

379

### POINTS OF LAW.

1 If the appellant promise the appellee, that if the latter will agree to have the appeal dismissed the appellant will pay him the full amount of the debt damages and costs, then due, upon the appeal; and the appellee consents, thereto, and the appeal is dismissed agreed, the appellee may maintain assumpsit on this promise; and the Court may leave the question of damages to the jury.

*Spotswood vs Pendleton.* 209.

Although the jury may fairly presume the defendants con-

sent, either previous or subsequent, yet if the judge give them a direction, as they may have been influenced by the direction, if that was wrong there ought to be a new trial.

*Herbert vs Alexander.*

3 The Court cannot be called on, to instruct the jury, to find a verdict for the defendants; although some of the evidence is written testimony.

*Martin vs Stover.*

514

### POWERS.

1 Testator devises slaves and personal estate to his wife, during widowhood, and then to be divided, at her discretion, amongst his children: The wife gave one of the slaves, in 1774 to one of the children, by personal gift. It was a good execution of the power, as to that slave.

*Morris vs. Owen.* 520

2 The wife could not under the power, appoint to the testator's grand children.

*Ibid.*

3 And the part of the property, which was ineffectually appointed, or not appointed at all, remained as part of the residuary estate of the testator, undisposed of, by his will.

4 The forms and solemnities required, by statute, for conveyances, are not necessary to be observed by a person who executes a power of appointment.

*Ibid.*

### PRACTICE.

Plea allowed to be amended after

er a trial, and verdict for  
plaintiff. *Richardson vs*  
*Unston.* ... 527.

### RELATION.

Relation, being a legal fic-  
tion contrived to support justice  
never to be admitted to do  
injury to a third person.  
*Peper vs Randolph* ... 186

### SCIREFACIAS

Vide Appeals No. 4.

### SECURITIES.

Vide Sheriff No. 3.

### SHERIFF.

1 If there be judgment, a-  
gainst a sheriff for the amount  
of money levied on an execution  
with the 15 per cent interest,  
and he appeals, the appellee by  
waiving the 10 per cent dama-  
ges, for retarding the execu-  
tion, and taking a simple affir-  
mance of the judgment, may still  
have his 15 per cent damages,  
according to the judgment of  
the Court below. *Guerrant vs*  
*Taylor.* ... 208

2 If the Sheriffs deputy drive  
or cause to be driven, one mans  
property on the lands of ano-  
ther, in order that he may le-  
vy a *distress warrant* on it;  
which he accordingly does; an  
action will lie against the sheriff  
for it. *James vs*  
*M'Cubbin.* ... 273

3 Bond given by a sheriff,  
through mistake, for the taxes  
imposed under an expired law,  
will not bind, the securities,  
for those of the true year.  
*Branch vs Commonwealth.* 510

4 But the Commonwealth's  
remedy is by action against the  
sheriff. *Ibid.*

5 *Quere* If a sheriffs bond,  
directed to be paid to the Trea-  
surer, is good, if made paya-  
ble to the Governor? *Ibid.*

6 *Quere* Also if the sum due  
from the sheriff, was payable in  
facilities, the jury may not con-  
sider the value of the certifi-  
cates at the time they ought to  
have been paid? And whether  
they are bound to allow the 15  
per cent given on motion, or  
may not judge of the real dama-  
ges? *Ibid.*

### SLAVES.

1 Slaves Recovering their  
freedom, are not entitled to  
damages for detention.

*Pleasants vs Pleasants.* ... 319

2 Construction of the 4th sec-  
tion of the explanatory act of  
1727 chap. IV. *Wallace vs*  
*Taliaferro.* ... 447

3. W. R. made his will, in  
May 1774, and devised to L  
W and C T fundry slaves, with  
the residue of his estate, subject  
to the payment of his debts and  
legacies; and appointed J W  
the husband of L W and R T  
the husband of C T executor:  
who qualified as such. In Au-  
gust 1774, J W died, before any  
division of W R estate was made  
and by his last will devised all  
his slaves to his daughter, and  
his two sons. As J W was at  
most only possessed as executor,  
and not in right of his wife  
her



her share of the slaves survived to herself, and did not pass by the will of J. W. Ibid.

4 W. B. devised Slaves to his daughter A. W. for life, remainder to all her children; one of whom, by the name of C. married E. C. and died in the lifetime of her mother and husband: Her husband took administration on her estate. A division was afterwards made of the slaves; and one by the name of Lazer, assigned as the share of the said C. C. The said E. C. the surviving husband, took possession of the said slave, and sold him to C. S. for a valuable consideration: After this, M. C., the eldest son of the said C. C., took possession of the said slave, and sold him to R. D. The sale by E. C., the husband, was good; and C. S., the purchaser is entitled to the slave. *Drummond vs Sneed.* 491.

#### SPECIE.

1 *Specie* during the war, was not an article of currency, but a commodity, at market; and items of *specie*, advanced during that period, should be extended, at the value, at the time of the advance made.

*McConico vs Curzen.* 358

#### STATUTES.

1 Rules of construction.

*Browne vs Turberville.* 390

2 *Quere:* Whether, in order to effect the intention of the Legislature, words may be interposed? Ibid.

3 A saving repugnant to the body of a statute is void. Ibid.

4 Rules for construing statutes. 462 to 468.

Vide descents No. 3.

#### SUPERSEDEAS.

1 If the District Court refuse to grant a *superseas*, on a judgment of the County Court, and enter the refusal on record, this court will not grant a *superseas*, but will award a *superseas* to the order of the District Court. *Mayo vs Ch.* 277

#### TENDER.

1 If to a suit, on a bill of exchange, dated in 1775, the defendant pleads that he tendered the interest in *paper money*, without confessing the action, as to the principal, or paying any thing in bar of it, the plea is bad. *Skipwith vs Morton & co.* 277

2 The defendant may give such tender in evidence, to extinguish the interest, on the plea of payment. Ibid.

3 But, if he withdraws the plea of payment, he relinquishes the evidence. Ibid.

4 And therefore, if there be a demurrer to the plea of *tender*, final judgment will be rendered for the plaintiff. Ibid.

#### USURY.

1 In order to constitute usury, both parties must be consenting to the unlawful interest; that is to say, the lender to ask

and

and the borrower to give.

*Price vs Campbell.* 110

2 Therefore if a bill of exchange is drawn upon an ob-  
literate man in Scotland, although  
the payee may *expect* it will  
be protested, yet if there was  
no agreement between him and  
the drawee, that it should be  
protested, the transaction is not  
usurious. Ibid.

3 There must be proof of a  
*lending and borrowing* to con-  
stitute usury. Ibid.

4 Where the profits of the  
mortgaged subject greatly ex-  
ceed the interest of the money  
lent, if there be an agreement  
to set the profits against the in-  
terest, it is usury. *Robertson*  
*vs Campbell.* 430

# WITNESS.

1 A witness received to prove  
that he paid a sum of money  
for the defendant to the agent  
of the plaintiffs assignors, in  
discharge of the obligation, up-  
on which the suit was brought;  
for he is not interested in the  
event of the suit. *Meade vs*  
*Tate.* 231

# WRIT OF RIGHT.

1 *Quere:* If non tenure may  
be given in evidence, in a writ  
of right, where the mise is join-  
ed upon the mere right?

*Hyers vs Green.* 555

2 Non tenure may be given  
in evidence, in a writ of right,  
where the mise is joined on the  
mere right. *Hyers vs Wood.*

674









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